



STAFF REPORT

DATE: DECEMBER 20, 2011
TO: HONORABLE MAYOR AND CITY COUNCIL
FROM: ROD FOSTER, CITY MANAGER/GENERAL MANAGER
PREPARED BY: AMER JAKHER, PUBLIC WORKS & UTILITY SERVICES DIRECTOR
SUBJECT: APPROVE OPERATIONS AND MAINTENANCE SERVICES AGREEMENT WITH EI COLTON , LLC FOR THE AGUA MANSA POWER PLANT

RECOMMENDED ACTION

It is recommended that City Council: (1) approve the Operations and Maintenance Services Agreement with EI Colton, LLC for the Agua Mansa Power Plant, effective January 1, 2012, and (2) Authorize the City Manager to sign a release form allowing Noresco, dba EI Colton, LLC, to use the City's name and images of the AMPP in a promotional video for the company.

GOAL STATEMENT

The proposed action will support the City's goals to provide safe, reliable, affordable, and environmentally sustainable electric service.

BACKGROUND

On June 21, 2011, City Council approved the Third Amendment to the Operations and Maintenance (O&M) Agreement with EI Colton, LLC, for the Agua Mansa Power Plant (AMPP). This Third Amendment extended services through June 30, 2012. At the time the Amendment was approved, staff was in the process of soliciting proposals to explore partnership opportunities for future operations at the plant. In light of this, the amendment also reduced the notification of termination requirement from 365 days to 90 days.

ISSUES/ANALYSIS

Staff issued a Request for Proposal to explore partnership opportunities for the Agua Mansa Power Plant on August 10, 2011. Two proposals were received. Staff is in the process of reviewing and evaluating the two proposals. Staff is also exploring other options which may be in the best interest of the City, such as possible expansion of the facility and the possibility of using bio gas in lieu of natural gas to make it an eligible-renewable source of energy under Senate Bill X1-2. During this evaluation period, staff has continued to negotiate a new O&M

Agreement with EI Colton, LLC, to further reduce costs and to ensure uninterrupted operations, while keeping in mind the Utility's need for a flexible contract.

In anticipation of either a partnership agreement or the execution of a new agreement, a Notice of Termination, effective 12/31/2011, was issued September 29, 2011. Termination of this agreement by this date will result in a cost savings of approximately \$180,000 due to the elimination of the annual incentive fee.

Staff and EI Colton, LLC have agreed, pending Council approval, to new contract terms to ensure uninterrupted operations at the Agua Mansa Power Plant while the City continues to explore options for future operations at the AMPP. The new agreement term will be January 1, 2012 through June 30, 2013, and will automatically renew for three one year periods, unless either party issues a notice of non-renewal at least 120 days prior to the automatic renewal date. The new agreement also includes language to allow the City the flexibility to terminate the agreement during any contract period, upon 180 days written notice, for any reason. If the City terminates the agreement within the first twelve months, a \$50,000 termination fee will be due to the contractor to compensate for demobilization costs. Staff believes the 180-day notice requirement will not become an issue, because if the City decides to sell, lease or otherwise hire another contractor to perform O&M services, it will likely take a minimum of 180 days to award a contract and have the permits with South Coast Air Quality Management District and San Bernardino Valley Municipal Water District changed to reflect new owners or new operators.

In addition to the City's standard insurance requirements, the agreement requires E.I. Colton, LLC, and the City each to maintain an excess liability insurance policy in the amount of \$10 million, with a deductible not-to-exceed \$500,000. Additionally, the City maintains a separate property damage policy on the equipment, including the boiler and machinery, in an amount not to exceed \$50 million. This new agreement limits EI Colton's liability by decreasing the cap on EI Colton's out-of-pocket liability from \$10 million to \$2.5 million, due to the reduced term of the contract. However, this cap is in addition to the amounts paid under EI Colton's insurance coverage, and does not apply if EI Colton has been grossly negligent or committed willful misconduct. Staff is of the opinion that this limit is acceptable based on the past performance of the contractor at the AMPP, and because of the cap exclusions for insurance and gross negligence.

In addition to approval of a new O&M Agreement, the contractor has requested the City of Colton sign a release form to allow the company to use the City of Colton's name, as well as images from the AMPP, in a promotional video of their company, to be used when competing for jobs at other agencies. Noresco is currently competing for a project with the City of Los Angeles Bureau of Sanitation. Staff has reviewed the request (attached) and is recommending City Council authorize the release form be signed by the City Manager.

FISCAL IMPACTS

Approval of the new agreement will realize a savings of approximately \$180,000 for fiscal year FY11/12. The agreement calls for the City to pay \$70,000 per month for the first six months of 2012, \$75,000 per month for the last six months of 2012, and an amount thereafter that is increased by a CPI-type escalator, plus reimbursable expenses incurred by EI Colton. Sufficient funds are included in the Electric Utility's FY11/12 Agua Mansa Power Plant Operations expense account 520-8000-8009-2225-0548-000.

ALTERNATIVES

1. City Council may provide alternate direction to staff.

ATTACHMENTS

1. Operations and Maintenance Services Agreement
2. Request and Release Form from Noresco, dba EI Colton, LLC

ATTACHMENT 1

Operations & Maintenance Services Agreement

**OPERATION & MAINTENANCE
SERVICES AGREEMENT**

Between

The City of Colton, California

And

EI Colton, LLC

for the

Colton Power Generation Project

Dated January 1, 2012

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SITE DESCRIPTION
EHS MATTERS
OVERHEAD PRODUCTS AND SERVICES

OPERATION AND MAINTENANCE SERVICES AGREEMENT

THIS OPERATION AND MAINTENANCE SERVICES AGREEMENT ("Agreement") dated as of the 1st day of January, 2012, is entered into by and between EI Colton, LLC ("Operator"), a limited liability company organized and existing under the laws of the State of Delaware, and the City of Colton, California, a California municipal corporation.

RECITALS

WHEREAS, Owner owns a nominal approximately 49 MW simple cycle gas-fired electrical generation facility (the "Facility") in Colton, California; and

WHEREAS, on October 15, 2002, the Parties entered into an Operation & Maintenance Services Agreement, (as amended by the Amendment and Termination Agreement dated June 30, 2004 (the "First Amendment") and again amended by the Second Amendment to the Operations & Maintenance Agreement dated _____ 2010 (the "Second Amendment"), the "Old O&M Agreement"), pursuant to which Operator agreed to operate and maintain the Facility for the Owner; and

WHEREAS, On September 29, 2011 the Owner issued a letter to Operator terminating the Old O&M Agreement effective December 31, 2011; and

WHEREAS, the Parties now desire to provide for Operator to continue to operate and maintain the Facility for the Owner under the terms and provisions of this Agreement;

NOW, THEREFORE, in consideration of the agreements and covenants set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound by this Agreement, the Parties covenant and agree as follows:

ARTICLE 1

DEFINITIONS AND RULES OF INTERPRETATION

1.01 Definitions.

Unless otherwise required by the context, terms appearing in this Agreement with their initial letter(s) capitalized shall have the meaning set forth in this Section 1.01.

"Additional Agreement" means any contract, instrument or agreement that (a) is entered into after the Effective Date; and (b) may materially affect (i) Operator's obligations or liabilities under this Agreement or (ii) the performance of the Services.

"Act" has the meaning given that term in Section 14.02(c) *{regarding additional representations and warranties of Owner}*.

"Affiliate" means, with respect to any Person,

(a) each Person that directly or indirectly, controls or is controlled by or is under common control with such designated Person;

(b) any Person that beneficially owns or holds fifty percent (50%) or more of any class of voting securities of such designated Person or holds fifty percent (50%) or more of the equity interest in such designated Person; or

(c) any Person of which such designated Person beneficially owns or holds fifty percent (50%) or more of any class of voting securities or in which such designated Person beneficially owns or holds fifty percent (50%) or more of the equity interest.

For the purposes of this definition, "control" "controlled by" and "under common control with" means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ownership of voting securities or by contract or otherwise.

"Agreement" means this Operation and Maintenance Services Agreement, including its Appendices, as each may be amended, supplemented or otherwise modified from time to time in accordance with the terms hereof.

"Applicable Law" means

(a) any and all laws, legislation, statutes, codes, acts, rules, regulations, ordinances, treaties or other similar legal requirements enacted, issued or promulgated by a Governmental Authority;

(b) any and all orders, judgments, writs, decrees, injunctions, Governmental Approvals or other decisions of a Governmental Authority; and

(c) any and all legally binding announcements, directives or published practices or interpretations, regarding any of the foregoing in (a) or (b) of this definition, enacted, issued or promulgated by a Governmental Authority;

to the extent, for each of the foregoing in (a), (b) and (c) of this definition, applicable to or binding upon (i) the Facility; (ii) a Party, its Affiliates, or their respective Representatives, to the extent any such Person is engaged in activities related to the Facility; or (iii) the property of a Party, its Affiliates, or their respective Representatives, to the extent such property is used in connection with the Facility or an activity related to the Facility.

"Authorization" means any corporate, governmental or other license, permit, approval, entitlement, allowance, franchise, or other authorization, including Governmental Approvals, applicable to or binding upon

(a) the Facility;

(b) a Party, its Affiliates, or their respective Representatives, to the extent any such Person is engaged in activities related to the Facility; or

(c) the property of a Party, its Affiliates, or their respective Representatives, to the extent such property is used in connection with the Facility or an activity related to the Facility.

Authorization shall also mean any approval by Owner's City Council required in connection with the funding of the Operating Account, or any other action of Owner.

"Authorized Operating Expenses" means any and all Operating Expenses that are

(a) incurred within the limitations of the applicable Operating Plan & Budget, as the case may be;

- (b) incurred in response to an Emergency, but only to the extent such Operating Expenses are incurred in accordance with Section 4.16 *{regarding Operator's emergency response obligations}*;
- (c) Owner Borne Fines paid by Operator;
- (d) Severance Obligations;
- (e) Insurance claim deductible amounts except for those paid by Operator in accordance with Section 9.03(b) *{regarding Operator's insurance deductible obligations}*;
- (f) insurance premiums paid by Operator in accordance with Section 9.04 *{regarding Operator's replacement insurance rights}*;
- (g) interest on late payments of Operating Expenses due to late deposits in the Operating Account by Owner; or
- (h) otherwise approved in writing by Owner.

"Availability" means, for any period of time for which Availability is being measured for purposes of Section 8.02, a fraction the denominator of which is the total number of hours during such period, and the numerator of which is the total number of hours during such period during which the Facility was capable of delivering electric energy in response to a request from Owner's dispatch coordinator; provided, however, that the Facility shall be deemed to have been available to deliver electric energy during any hour when the Facility was unavailable, in whole or in part, for any reason other than a Forced Outage; and provided, further, that the Facility shall not be deemed to have been unavailable for purposes of determining Availability on any day to the extent that Owner's dispatch coordinator did not schedule Facility operation by 10:00 a.m. prevailing Pacific Time the preceding day. For any hour during which the Facility was capable of delivering some, but not all, of the electric energy that could have been produced if the Facility was operating at full capacity (as determined by the last capacity test performed in the Facility) due to a partial Forced Outage, the numerator shall include a fraction of an hour the numerator of which is the amount of electric energy which the Facility was capable of delivering during such hour, and the denominator of which is the amount of electric energy that could have been produced if the Facility was operating at full capacity.

"Bankruptcy" means, with respect to a Person, any situation in which

- (a) such Person (i) applies for or consents to the appointment of, or the taking of possession by, a trustee, receiver, custodian, liquidator or the like of itself or of all or a substantial part of its property; (ii) admits in writing its inability, or becomes generally unable, to pay its debts as such debts become due; (iii) makes a general assignment for the benefit of its creditors or takes any other similar action for the protection or benefit of its creditors; (iv) commences a voluntary case under the Federal Bankruptcy Code; (v) files a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, composition or adjustment of debts or other relief for debtors; or (vi) takes any action for the purpose of effecting any of the foregoing; or
- (b) a proceeding or case is commenced without the application or consent of such Person in any court of competent jurisdiction, seeking (i) such Person's liquidation, reorganization, dissolution, winding-up, composition or readjustment of its debts or other relief for its debtors; (ii) the appointment of a trustee, receiver, custodian, liquidator or the like of such Person or of all or a substantial part of its property under any law relating to bankruptcy, insolvency, reorganization, winding-up, composition or adjustment of its debts or other relief for its debtors; or (iii) a warrant of attachment, execution or similar process against all or a substantial part of the assets of such Person; and such proceeding or case shall continue undismissed, or any order, judgment or decree approving or ordering any of the foregoing in (b) (i), (ii) or (iii) of this definition shall be entered and continue unstayed and in effect, for a period of

ninety (90) or more days, or any order for relief against such Person shall be entered in an involuntary case under the Federal Bankruptcy Code.

"Base Fee" means a fee paid by Owner to Operator, equal initially to \$70,000 per month, or a prorated portion of such amount for any partial month, as part of the consideration for performance of the Services for the period from January 1 through June 30, 2012, and \$75,000 per month or a prorated portion of such amount for any partial month, for the period from July 1, 2012 through June 30, 2013. In accordance with Section 6.01 herein, the monthly fee paid by Owner to Operator shall be subject to escalation beginning January 1, 2013. Operator's Labor Expenses and Non-Reimbursable Expenses are included in the Base Fee.

"Best Efforts" means a level of effort which, in the exercise of reasonable judgment in the light of facts or circumstances known, or which should reasonably be known, at the time a decision is made, can be expected by a reasonable Person to accomplish the desired result at a reasonable cost, within a reasonable time and in a manner consistent with Industry Standards and Practices.

"Business Day" means any day other than Saturday, Sunday or a weekday on which commercial banks are authorized or required to close in the State of California.

"Change in Law" means:

(a) the enactment, adoption, promulgation, renewal, restatement, modification or reinterpretation after the Effective Date of any Applicable Law;

(b) (i) the non-renewal, suspension or withdrawal after the Effective Date of any Governmental Approval; (ii) the renewal, extension, replacement or modification after the Effective Date of any Governmental Approval on terms materially less favorable than in effect on the Effective Date; or (iii) the issuance or denial after the Effective Date of any Governmental Approval;

except, for each of the foregoing in (b) (i), (ii) or (iii) of this definition, to the extent that (A) the Party claiming that a Change in Law has occurred was responsible for obtaining, maintaining, renewing, extending, replacing or modifying such Government Approval, (B) such Party failed to properly or timely make application therefor, and (C) such failure resulted in the non-renewal, suspension, withdrawal or denial of such Governmental Approval or the renewal, extension, replacement or modification of such Governmental Approval on terms materially less favorable than in effect as of the Effective Date; or

(c) any other restrictions or restraints imposed after the Effective Date by Applicable Law;

but only, for each of (a), (b) and (c) in this definition, to the extent such Change in Law has a material adverse effect on the Facility, the Parties or the performance of either Party's obligations under this Agreement.

"Collateral Assignee" has the meaning given to that term in Section 16.06(c).

"Confidential Information" means any written information relating to the Facility, a Party, or their respective Representatives (including any data, experience, know-how, documents, secrets, dealings, transactions or affairs) labeled as "Confidential" or "Proprietary" and disclosed by or on behalf of Disclosing Party to the Receiving Party; provided that all records and reports prepared by Operator in accordance with this Agreement, regardless of how such records and reports are labeled, shall be deemed to be the Confidential Information of Owner. The previous sentence notwithstanding, Confidential Information shall not include any information which

(a) was, prior to its disclosure, already in the possession of the Receiving Party free of restrictions on disclosure or use;

(b) was or hereafter is disclosed to the Receiving Party by other than the Disclosing Party as a matter of right, free of restrictions on disclosure and use; or

(c) is in the public domain at the time of disclosure or which subsequently becomes part of the public domain through no fault or wrongful act of the Receiving Party, provided that Operator acknowledges that Owner may be required to disclose certain information pursuant to the California Public Records Act, and that such disclosure shall be deemed to have occurred through no fault or wrongful act of Owner.

"Contamination" means the presence, emission, discharge or release of any Hazardous Materials which may require notification, remediation or other response in accordance with Applicable Law.

"Default Budget" means, in the absence of an approved Operating Plan & Budget for performing the Services due to a disagreement between the Parties, the budget prepared by Operator in accordance with Section 5.02.3 *{regarding Default Budget preparation procedures}*.

"Demobilization Costs" means the costs and expenses reasonably incurred and paid or payable by Operator as a result of a suspension of the Services or a termination of this Agreement, as contemplated in Section 2.03.3 *{regarding Demobilization payment procedures}*, including any cancellation or termination charges incurred by Operator in accordance with any Facility or Services related agreement to which Operator is a party.

"Demobilization Invoice" means the invoice for Demobilization Costs prepared by Operator and submitted to Owner in accordance with Section 2.03.3 *{regarding Demobilization payment procedure}*.

"Disclosing Party" means a Party, its Affiliates or any of their respective Representatives or outside advisors (such as auditors, accountants, engineers and attorneys) that discloses Confidential Information to the Receiving Party.

"Dispute" means any controversy, dispute or claim between the Parties in connection with, relating to, or arising out of this Agreement (including any question regarding its existence, validity, interpretation, or termination or the performance or non-performance of a Party) that cannot be resolved informally by the Plant Manager and the Owner's Representative within seven (7) days of such controversy, dispute or claim being brought to the attention of one such individual by the other such individual.

"Due Date" has the meaning given to that term in Section 8.04.

"Effective Date" means the date first above written.

"EHS" means environmental, health and safety.

"Emergency" means any condition or circumstance related to the Facility which, in the reasonable opinion of Operator, requires prompt action in order to (i) avoid or mitigate personal injury, substantial property damage, violation of an Applicable Law or any other material adverse impact on the Facility, the Parties, any other Person, or the performance of the Services; or (ii) maintain operational reliability of the Facility or avoid disruption in the delivery of electric service to Owner or its customers.

"Emergency Response Plan" means the plan developed by Owner and Operator pursuant to Section 4.16.

"Environmental Claims" means, with respect to any Person, any and all suits, sanctions, liabilities, legal proceedings, claims, demands, Losses, costs and expenses of whatsoever kind or character, including reasonable attorneys' fees, civil fines or penalties or other expenses, incurred by, sustained by or assessed against such Person and directly or indirectly relating to or arising out of the actual or the alleged existence, generation, use, collection, treatment, storage, transportation, recovery, removal, discharge, emission release, threatened release or disposal of Hazardous Materials present at, in or under the Facility or adjacent areas or the violation of any Applicable Law relating to pollution or protection of human health or the environment, including ambient air, surface water, groundwater, wetlands, land surface or subsurface strata. Such Applicable Laws include the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. § 9601 *et seq.*); the Hazardous Material Transportation Act, as amended (49 U.S.C. § 1801 *et seq.*); the Resource Conservation and Recovery Act, as amended (42 U.S.C. §6901 *et seq.*); the Toxic Substances Control Act, as amended (42 U.S.C. §7401 *et seq.*); the Clean Air Act, as amended (42 U.S.C. § 7401 *et seq.*); the Federal Water Pollution Control Act, as amended (33 U.S.C. §1251 *et seq.*); the Clean Water Act of 1977, as amended (33 U.S.C. §1251 *et seq.*); the Emergency Planning and Community Right-to-Know Act of 1986, as amended (42 U.S.C. §§11001 *et seq.*, 11021 *et seq.*, and 11041 *et seq.*); any similar state and local laws and, in each case, the regulations promulgated pursuant to such laws.

"EPC Agreement" means that certain Engineering, Procurement and Construction Agreement For Power Generation Project, dated June 4, 2002.

"ERC" means (i) NOx RECLAIM Trading Credits, (ii) PM10 ERCs, and (iii) Allowances under the Acid Rain Program pursuant to 40 CFR 72.2.

"Escalation Factor" means the Gross Domestic Product Implicit Price Deflator as published routinely by the Bureau of Economic Analysis, U. S. Department of Commerce, its successor or such other reasonably appropriate indicator of inflation acceptable to the Parties.

"Extra Work" has the meaning given that term in Section 4.17 *{regarding additional services requested by Owner}*.

"Facility" means the nominal approximately 49 MW simple cycle gas-fired electrical generation facility to be constructed by Owner in the City of Colton, California.

"Facility Manuals" means

- (a) the administrative policies and procedures manual(s);
- (b) the operations and maintenance manual(s);
- (c) the safety manual(s);
- (d) the environmental compliance manual(s);
- (e) the training manual(s);
- (f) the Emergency Response Plan; and
- (g) any other manuals or plans (except for accounting and operating records, logs and reports) associated with operation and maintenance of the Facility or performance of the Services that are, in either case, required by this Agreement or by Applicable Law;

in each case as amended, supplemented or replaced from time to time.

"Facility Work Force" means the employees of Operator or its Affiliates who are primarily engaged in or dedicated to performing the Services on a long term or permanent basis. The Facility Work Force personnel may not necessarily be located at the Facility. The Facility Work Force does not include Representatives of Operator or its Affiliates who:

- (a) are members of the corporate staff of Operator or its Affiliates;
- (b) are assigned to another project operated by Operator or its Affiliates; or
- (c) perform a portion of the Services in accordance with a subcontract between Operator and its Affiliate.

"Final Expenses & Fees Invoice" means the invoice prepared by Operator and submitted to Owner after the termination or expiration of this Agreement in accordance with Section 2.03.1 *{regarding Final Expenses & Fees invoicing procedures}*.

"Fiscal Year" means a fiscal year of July 1 to June 30.

"Forced Outage" means an interruption of the generating capability of the Facility which is not otherwise permitted under this Agreement, and which is not the result of (i) scheduled maintenance; (ii) an event or occurrence of Force Majeure; (iii) a breach of this Agreement by Owner (including Operator's exercise of its remedies under Section 2.02.3); (iv) Owner's failure to make Operating Account Deposits when due; (v) an interruption in transmission by any transmission service provider; (vi) compliance with any limits on the operation of the Facility contained in any Governmental Approval; or (vii) a suspension of the Services by Operator that is authorized under Section 2.02.3.

"Force Majeure" means any event which wholly or partly prevents or delays the performance of any obligation arising under this Agreement, but only if and to the extent

- (a) such event is not within the reasonable control, directly or indirectly, of the Party affected;
- (b) such event, despite the affected Party's use of its Best Efforts, cannot be, or caused to be, avoided by the affected Party or its Affiliates;
- (c) the affected Party utilizes its Best Efforts to avoid, mitigate or eliminate the effect of such event on such Party's ability to perform its obligations under this Agreement; and
- (d) such event is not the direct or indirect result of the affected Party's gross negligence, or Willful Misconduct;

provided that Operator's obligations set forth in clauses (b) and (c) above of this definition to take actions that are not included in the applicable Operating Plan & Budget, or not otherwise contemplated hereunder, are subject to funds being made available by Owner for such purposes, and provided further that no action or inaction of the City of Colton, or any agency or department thereof, shall be a Force Majeure as to the obligations of Owner hereunder.

Subject to the foregoing, a Force Majeure shall include any of the following:

- (a) acts of God, acts of the public enemy, acts of terrorism, war (whether declared or not), blockade, insurrection, riot, civil disturbance or disobedience, kidnapping, public disorder, rebellion, violent demonstration, revolution, sabotage or acts of third parties designed to have the effect of, or

having the effect of, interrupting the performance of the Services or increasing the costs of performing the Services;

(b) (i) expropriation, requisition, confiscation, nationalization or other compulsory acquisition by any Governmental Authority; (ii) quarantine, export or import restriction or other restrictions, rationing or allocations imposed by any Governmental Authority; or (iii) any other action or inaction by any Governmental Authority;

(c) any effect of unusual natural elements, including pestilence, epidemic, volcanic eruption, landslide, earthquake, flood, lightning, unusually severe storm, perils of sea, or similar cataclysmic occurrence or other unusual natural calamity;

(d) fire, explosion or accident;

(e) labor difficulties, including general strikes, lockouts or other collective or industrial action by workers or employees;

(f) (i) the unavailability of goods or services required by the affected Party to fulfill its obligations under this Agreement; provided that market conditions affecting the price of goods or services shall not constitute a Force Majeure; (ii) the breakdown of the Facility or other plant breakdown or equipment failure provided it has been maintained as provided in this Agreement; or (iii) any event affecting the ability of any supplier (including under any fuel supply agreement) to fulfill its obligations to either of the Parties or with respect to the Facility; provided that, for each of subclauses (i), (ii) and (iii) of this clause (f), the cause thereof otherwise would qualify under this Agreement as a Force Majeure;

(g) Change in Law;

(h) Contamination, or other environmental or nuclear emergency, at or affecting the Facility; and

(i) air crash, shipwreck, train wreck, or other failures or delays of transportation; provided that the cause of such transportation related failure or delay otherwise would qualify under this Agreement as a Force Majeure.

"GAAP" means generally accepted accounting principles of the United States of America as promulgated by the Financial Accounting Standards Board.

"Governmental Approvals" means any and all permits, licenses, variances, authorizations, franchises, and other approvals issued or granted by any Governmental Authority to the Facility or to either Party, its Affiliates, or their respective Representatives in connection with such Person's participation in any activity related to the Facility.

"Governmental Authority" means any

(a) competent federal, state or local government;

(b) competent government related regulatory or supervisory department, body, political subdivision, commission, agency, authority, instrumentality, ministry, court, judicial or administrative body, taxing authority; or

(c) corporation or other entity owned or controlled by any of the foregoing in (a) or (b) of this definition;

provided that such entity has or asserts jurisdiction over either Party or the Facility; and provided, further, that neither the City of Colton, nor any agency or department thereof, shall be deemed to be a Governmental Authority for the purposes of this Agreement other than to the extent of Government Approvals that are required to be issued by the City of Colton, or any agency or department thereof, for

the operation or maintenance of the Facility.

"Hazardous Materials" means

- (a) any petroleum or petroleum products, radioactive materials, asbestos in any form that is or could become friable, urea formaldehyde foam insulation or transformers or other equipment that contain dielectric fluid containing polychlorinated biphenyl's ("PCB's");
- (b) any chemical, material or substance which is now or hereafter becomes defined as or included in the definition of "hazardous substances", "hazardous wastes", "hazardous materials", "extremely hazardous wastes", "restricted hazardous wastes", "toxic substances", "toxic pollutants", "pollution", "pollutants", "regulated substances" or words of similar import under any EHS related Applicable Law; and
- (c) any other chemical, material, substance or waste declared to be hazardous, toxic or a polluting material by any Governmental Authority;

in each case, exposure to which is now or hereafter prohibited, limited or regulated by any Governmental Authority.

"Indemnified Party" means any Person entitled to be indemnified in accordance with Article X *{regarding Indemnification}*.

"Indemnifying Party" means the Party required to indemnify the Indemnified Party in accordance with Article X *{regarding Indemnification}*.

"Industry Standards and Practices" means the practices, methods, standards and procedures that

- (a) do not constitute negligence or Willful Misconduct;
- (b) are generally accepted and followed by reasonably qualified operators who, while reasonably accounting for local conditions (including local infrastructure support), act prudently, diligently and in accordance with standards generally adopted by operators of non-utility generator facilities similar in size, technology and location to that of the Facility; and
- (c) would be expected by such reasonably qualified operator, at the particular time in question and in the exercise of reasonable judgment in the light of facts or circumstances then known, or that reasonably should have been known, to accomplish the desired results in a manner consistent with this Agreement, Applicable Law, safety and environmental protection.

Industry Standards and Practices are not intended to be limited to the optimum practice or method to the exclusion of all others, but rather to be a spectrum of reasonable and prudent practices, methods, standards and procedures. In the case of the Facility, Industry Standards and Practices includes taking reasonable steps to provide for:

- (a) adequate goods and services being available to (i) perform the Services in accordance with this Agreement under reasonably anticipated conditions and (ii) achieve the objectives set forth in the applicable Operating Plan & Budget;
- (b) sufficient reasonably qualified operating personnel (i) being available to perform the Services in accordance with this Agreement and (ii) with the capability of responding appropriately to Emergencies and other reasonably abnormal conditions;
- (c) predictive, preventive and reactive routine and non-routine maintenance and repairs in

accordance with this Agreement;

(d) appropriate monitoring and testing to determine that equipment is functioning, and can reasonably be expected to function, properly under reasonably anticipated conditions; and

(e) materials being used and equipment being operated in a safe and environmentally responsible manner and with regard to the limitations specified in the Manufacturers Recommendations, and by the Facility's design engineer and the insurance underwriters.

"Labor Expenses" means the cost and expenses, including, without duplication, accrued costs and expenses incurred by Operator in connection with employment of the Facility Work Force personnel, to the extent such personnel are engaged in performing the Services, including:

(a) wages and salaries, including those amounts paid for vacation, holidays and sick leave;

(b) wages and salaries earned but not paid for accrued vacation and floating and personal choice holidays;

(c) overtime premiums;

(d) incentive bonuses;

(e) if required, design and administration of benefit programs for Facility Work Force personnel that are materially different than those programs used widely for employees of Operator and its Affiliates;

(f) the employer's share of pension plan contributions and other retirement and post retirement benefits costs and expenses, retirement and post retirement benefit reserve contributions and, without duplication, retirement or pension plan pay-outs;

(g) the employer's share of medical, vision, dental, disability and life insurance benefits for Facility Work Force personnel and their dependents;

(h) Severance Obligations;

(i) the employer's share of Social Security and Medicare tax and government mandated disability, unemployment and worker's compensation insurance (at the statutory rate in effect in the state in which the Facility is located);

(j) any fees incurred in connection with subcontracting for unionized labor, if applicable, and

(k) any such other costs or expenses incurred or accrued by Operator in connection with employment or employment termination of Facility Work Force personnel.

Labor Expenses shall not include any Non-Reimbursable Expenses incurred in connection with performing certain services related to the Facility.

"Liability Limiting Situation" has the meaning given to that term in Section 11.04 *{regarding Operator's limited liability situations}*.

"Losses" means, with respect to a Party, its Affiliates, or their respective Representatives, any and all costs, expenses, liabilities, damages, injuries or other financial losses of any kind or nature, including fines, penalties, claims, awards, judgments, demands, insurance deductibles, court costs and reasonable attorneys' fees, incurred by such Person; provided that in no event shall Losses include any indirect, incidental, exemplary, collateral, consequential or punitive damages.

"Manufacturers' Recommendations" means the written instructions, procedures and recommendations relating to the operation, maintenance and repair of equipment used at the Facility which are issued by the manufacturer of such equipment, and any revisions thereto, issued by the manufacturer, which

- (a) have been delivered to Operator;
- (b) are valid and applicable (or reasonably believed by Operator to be valid and applicable) at the time such operation, maintenance or repair is undertaken;
- (c) are consistent with the requirements of the insurance underwriters for the Facility; and
- (d) have not been superseded by written agreement of Owner and Operator.

"Non-Reimbursable Expenses" has the meaning given to that term in Appendix C.

"Non-Recurring Operating Expenses" means Operating Expenses that do not occur or are not expected to occur consistently at least once every Fiscal Year.

"Notice" means a written communication regarding

- (a) the occurrence of an event related to the Facility;
- (b) the intent to take or omit to take any action related to the Facility;
- (c) a consent, approval or the request therefor;
- (d) other similar type of communication related to the Facility; or
- (e) any other communication required to be given under this Agreement;

delivered, in each of the foregoing in (a), (b), (c), (d), and (e) of this definition, by one Party to the other Party in accordance with Section 16.05 regarding Notice procedures).

"NO_x RECLAIM Trading Credits" means NO_x RECLAIM Trading Credits pursuant to SCAQMD Rule 2000(c)(63).

"Operating Expenses" means all costs and expenses, including both Reimbursable Expenses and Non-Reimbursable Expenses, incurred by Operator, or by Owner at the direction of Operator as agent for Owner, in connection with the performance of the Services in accordance with this Agreement, including:

- (a) Labor Expenses;
- (b) costs and expenses incurred in connection with organized labor activities, including contract negotiations dispute resolutions, and responses to organization attempts and grievances, but not including any costs or expenses incurred in connection with a labor related grievance or dispute which is the result solely of any act or omission by Operator and which the National Labor Relations Board, or its successor, has determined finally is the result of an unfair labor practice;
- (c) costs and expenses incurred in connection with the procurement and delivery of goods and services and the administration of procurement contracts;
- (d) costs and expenses incurred by Operator in connection with performing certain services as exemplified by the descriptions and definitions in Appendix C;
- (e) costs and expenses incurred in connection with reactive, preventive and predictive maintenance and repairs;
- (f) costs and expenses incurred in connection with capital improvements, additions, replacements and alterations;
- (g) costs and expenses incurred in connection with Emergencies, Force Majeure events and Changes in Law;
- (h) costs and expenses incurred in connection with the use or consumption of water supply and wastewater discharge services, electric power, telephone and other utility related services;
- (i) costs and expenses incurred for fuel, including all costs and expenses under any fuel

supply or transportation agreement;

- (j) costs and expenses incurred in connection with waste handling and disposal;
- (k) costs and expenses incurred in connection with training the Facility Work Force personnel and Third Party Suppliers engaged to perform Services at the Facility;
- (l) costs and expenses incurred in connection with obtaining and maintaining insurance protection, including insurance policy premiums and deductibles and insurance premiums paid by Operator in connection with its general corporate insurance protection program but only to the extent such premiums are the result solely of Operator's participation in the Facility;
- (m) costs and expenses incurred in connection with legal, accounting and technical consulting related professional services;
- (n) costs and expenses incurred in connection with Site security;
- (o) costs and expenses incurred in connection with obtaining, maintaining, renewing, extending and complying with Governmental Approvals and other Authorizations;
- (p) Owner Borne Fines;
- (q) any and all assessments by a Governmental Authority related to the Facility, including sales and gross receipts taxes, duties and levies, except for those assessed against Operator as a result of its taxable net income;
- (r) costs and expenses incurred in connection with restoration or reclamation of the Site;
- (s) costs for Utility Services; and
- (t) interest on late payments of Operating Expenses due to Operator by Owner.

A 15% mark-up will be added to all actual Reimbursable Expenses to cover Operator's administrative costs.

"Operating Expenses Statement" means a written description, together with supporting documentation, of all Authorized Operating Expenses paid or reasonably expected by Operator to be due and payable, during the period(s) specified in such description, prepared by Operator and delivered to Owner in accordance with Article VI,

"Operating Plan & Budget" means the operating plan and budget for performing the Services during the Fiscal Year specified in such plan & budget, as such plan & budget is prepared by Operator and approved by Owner in accordance with Sections 5.02.1 *{regarding Proposed Operating Plan & Budget preparation procedures}* and 5.02.2 *{regarding Owner's approval of Operating Plans & Budget}* respectively.

"Operator" means EI Colton, LLC.

"Operator Borne Fine" means any charge, fee, fine or penalty that is:

- (a) assessed by any Governmental Authority against the Facility or the Operator, its Affiliates, or their respective Representatives;
- (b) a consequence of a violation by Operator of any Applicable Law, other than a violation which results from Operator's operation or maintenance of the Facility in compliance with the Annual Operating Plan and Budget, or in accordance with the instructions of Owner (including Owner's dispatch coordinator); and
- (c) the result of (i) Operator's employment practices or those of its Affiliates; or (ii) the negligence or Willful Misconduct of Operator, its Affiliates, or their respective Representatives.

"Operator Event of Default" has the meaning given to that term in Section 11.01

{regarding the descriptions of Operator Events of Default}.

"Operator Indemnitee" means each of Operator, its Affiliates and their respective Representatives, who is entitled to indemnification by Owner in accordance with Section 10.01 *{regarding Owner's Operator indemnification obligations}.*

"Operator Invoice" means an invoice for the Base Fee and Reimbursable Expenses prepared by Operator and delivered to Owner in accordance with Section 6.01 *{regarding Operator Fee billing procedures}.*

"Overdue Payment Rate" means the lesser of (a) the interest rate (sometimes referred to as the "prime rate" or the "base rate") for large commercial loans to creditworthy entities announced from time to time by Citibank, N.A. (New York), or its successor bank, or, if such rate is not announced, the rate published in The Wall Street Journal, eastern edition, as the "prime rate" from time to time (or, if more than one rate is published, the arithmetic mean of such rates), in either case, as of the date two (2) Business Days prior to the date a payment required by this Agreement to which the Overdue Payment Rate is applied is first due and payable, plus two percent (2.0%) and (b) the highest rate permitted by Applicable Law.

"Owner" means the City of Colton, California.

"Owner Borne Fine" means any charge, fee, fine or penalty that is (a) assessed by any Governmental Authority against the Facility or a Party, its Affiliates, or their respective Representatives; and (b) not an Operator Borne Fine.

"Owner Event of Default" has the meaning given to that term in Section 11.02 *{regarding the description of Owner Events of Default}.*

"Owner Indemnitee" means each of Owner, its Affiliates, and their respective Representatives, who is entitled to indemnification by Operator in accordance with Section 10.02 *{regarding Operator's Owner indemnification obligations}.*

"Owner's Representative" means that individual designated by Owner, in accordance with Section 3.01 *{regarding procedures for naming the Owner's Representative}*, to act as the representative of Owner in all matters relating to this Agreement.

"Party" means Operator or Owner.

"Person" means any legal or natural person, including any individual, corporation, partnership, limited liability company, trust, governmental or international body or agency, or other entity.

"Plant Manager" means that individual designated by Operator, in accordance with Section 4.05 *{regarding Plant Manager selection procedure}*, to act as the representative of Operator in matters relating to this Agreement.

"PM10 ERCs" means PM10 Emission Reduction Credits pursuant to SCAQMD Rule 1302(j).

"Proposed Budget" means the proposed Operating Expenses budget for a specified Fiscal Year prepared by Operator and submitted to Owner in accordance with in Section 5.02.2.

"Proposed Operating Plan & Budget" means the proposed plan of operations and budget for a specified Fiscal Year prepared by Operator and submitted to Owner in accordance with Section 5.02.1

{regarding Proposed Operating Plan & Budget preparation procedures}.

"Receiving Party" means a Party, its Affiliates or any of their respective Representatives or outside advisors (such as auditors, accountants, engineers and attorneys) that receives Confidential Information from the Disclosing Party.

"Reimbursable Expenses" has the meaning given to that term in Appendix C.

"Representative" means, with respect to a Party, any principal, shareholder, director, officer, employee or agent of such Party or its Affiliates, but only to the extent, in each case, such individual is engaged in the fulfillment of an obligation under this Agreement and is fulfilling such obligation in his or her capacity as a principal, shareholder, director, officer, employee or agent of such Party or its Affiliate.

"Services" means the obligations of Operator as set forth in this Agreement.

"Severance Obligation" means severance or separation related payments that are paid or payable by Operator or its Affiliate to a Facility Work Force personnel, in accordance with (a) Applicable Law or (b) an established policy or practice of Operator or its Affiliate that has been approved by Owner, upon the termination of such individual's employment with Operator or its Affiliate for any reason, including a reduction in the Facility Work Force, a suspension of the Services or the expiration or termination of this Agreement.

"Severance Obligation Invoice" means the invoice for Severance Obligations prepared by Operator and delivered to Owner in accordance with Section 2.03.2 *{regarding Severance Obligation Invoice procedures}*.

"Site" means the property on which the Facility is situated, generally located east of Agua Mansa Road and south of the City's RIX wastewater facility in Colton, California, and more particularly described in Appendix A.

"Successor Operator" means the Person, which may be Owner or its Affiliate, designated by Owner to operate the Facility upon the termination or expiration of this Agreement.

"Term" has the meaning given that term in Section 2.01 *{regarding Term of this Agreement}*.

"Termination Fee" means the sum of \$50,000, payable to Operator in accordance with Section 2.03.4 *{regarding Termination Fee}*.

"Termination Fee Invoice" means the invoice for the Termination Fee prepared by Operator and delivered to Owner in accordance with Section 2.03.4 *{regarding Termination Fee Invoice procedures}*.

"Third Party Supplier" means any Person other than Operator and its Affiliates engaged by Operator as an agent of Owner to perform any portion of the Services, including supplying goods, in accordance this Agreement.

"Third Party Losses" means, with respect to a Person other than a Party and their respective Affiliates, any and all claims by such Person for any and all costs, expenses, liabilities, damages, injuries or other financial losses of any kind or nature, including fines, penalties, claims, awards, judgments, demands, insurance deductibles, court costs and attorneys' fees.

"Utility Services" means fuel, electrical power, water supply service, wastewater discharge service and telephone service required for the operation and maintenance of the Facility.

"Willful Misconduct" means a deliberate or intentional act or omission by a Party, its Affiliate, or their respective Representatives while acting in their capacity as a Representative of such Person, which results in a material breach of any provision of this Agreement.

1.02 Rules of Interpretation.

The following rules of interpretation of this Agreement shall apply unless otherwise specified in this Agreement or unless the context otherwise requires:

- (a) Words of any gender include each other gender.
- (b) Using the singular or plural number also includes the plural or singular number, respectively.
- (c) Any reference to any Person in any capacity includes a reference to its successors and permitted assigns in such capacity and in the case of any Governmental Authority, any Person succeeding to its functions and capacities.
- (d) The terms "hereof," "herein," "hereto," "hereunder" and words of similar or like import refer to this entire Agreement and not to any particular Article, Section, Appendix, or other subdivision of this Agreement.
- (e) References to a particular "Article," "Section," or "Appendix" are, unless otherwise noted, references to that Article or Section of, or Appendix to, this Agreement.
- (f) The words "include," "includes" and "including" shall be deemed to be followed by "without limitation" or "but not limited to."
- (g) Unless reference is made to Applicable Laws as of a specific date, References to any Applicable Law shall be construed as a reference to such Applicable Law and to all regulations and rulings promulgated thereunder as such laws, regulations and rulings may be in effect from time to time.
- (h) References to any agreement or document (including this Agreement) shall include all exhibits, schedules, appendices, and other attachments thereto.
- (i) References to (i) days shall refer to calendar days unless Business Days are specified, (ii) weeks and months shall refer to calendar weeks and months, respectively and (iii) years shall refer to calendar years unless otherwise specified.
- (j) All accounting terms used but not expressly defined herein shall have the meanings given to them under GAAP and as may be appropriate to the books, records and accounts established and maintained in accordance with this Agreement.
- (k) In computing any period of time prescribed or allowed under this Agreement, the day of the act, event or default from which the designated period of time begins to run shall be included.

1.03 Conflicting Provisions.

This Agreement and its Appendices are intended to be construed together as a consistent whole and for a common purpose. In the event of any irreconcilable conflict between the body of this Agreement and any of its Appendices (a) the Party discovering such conflict shall deliver a written Notice to the other Party as soon as reasonably practical and (b) the terms and provisions of the body of this Agreement shall control.

1.04 Effect of Old O&M Agreement.

The Parties acknowledge that the Old O&M Agreement is of no further force or effect, with the exception of provisions thereof that by their terms survive the expiration of the Old O&M Agreement.

ARTICLE II

TERM & TERMINATION

2.01 Term.

The term of this Agreement (the "Term") shall begin on the Effective Date and end at 11:59 p.m. prevailing Pacific Time on June 30, 2013, unless earlier terminated in accordance with the terms hereof. The Term will automatically renew for additional periods of one (1) year each, unless one hundred and twenty (120) days Notice is given prior to an automatic renewal date by either Party of its intention to terminate this Agreement, or the Agreement has been terminated as provided herein.

2.02 Suspension or Termination.

2.02.1 By Either Party.

Either Party may terminate this Agreement in the event a Force Majeure event continues for a period of six (6) months or more; provided that the terminating Party delivers a written Notice of termination to the other Party at least thirty (30) days prior to the effective date of such termination.

2.02.2 By Owner.

Owner may terminate this Agreement in accordance with Section 11.03 *{regarding default termination procedures and remedies}* for an Operator Event of Default. In addition, Owner may terminate this Agreement at any time upon one hundred (180) days notice.

Owner may require that Operator suspend performance of all or any portion of the Services for any period of time, by delivering a written Notice to Operator of such suspension. In such event, Operator shall be relieved of any obligation to perform the suspended Services during the period of suspension. Owner's suspension Notice shall detail the portion of the Services to be suspended and the expected duration of the suspension. Operator shall use its Best Efforts to minimize the Operating Expenses during the suspension, but such suspension shall not affect Owner's obligation to fund Operating Expenses, including Labor Expenses, that cannot be reasonably avoided during such suspension, nor shall Owner be relieved of its obligation to pay the Base Fee during such suspension.

2.02.3 By Operator.

2.02.3.1 Operator may terminate this Agreement

(a) in accordance with Section 11.03 *{regarding default termination procedures and remedies}* for an Owner Event of Default;

(b) upon thirty (30) days prior written notice in the event that Owner's City Council fails to approve, or Owner fails to secure any other necessary Authorization for the annual Operating Plan & Budget or any amendment to any annual Operating Plan & Budget, in each case as agreed upon by the Parties or resolved in accordance with Article XIII *{regarding Dispute Resolution Procedures}*, or any Default Budget established pursuant to Section 5.02.3 *{regarding Default Budget procedures}*.

2.02.3.2 Operator may suspend performance of the Services

- (a) in accordance with Section 3.04 *{regarding Authorizations}* for Owner's failure to obtain, renew or extend Authorizations required to legally perform the Services;
- (b) in accordance with Section 3.06 *{regarding Fine and Penalties}* for Owner's failure to pay Owner Borne Fines;
- (c) in accordance with Section 7.02 *{regarding Operator's EHS related rights}* to avoid a material civil penalty or a criminal penalty of any kind; or
- (e) in accordance with Section 9.04 *{regarding Operator's rights upon cancellation, termination or expiration of Owner's insurance}* for Owner's failure to maintain the insurance required to be maintained by Owner under this Agreement or otherwise to fulfill its insurance-related obligations under this Agreement.

Operator shall use its Best Efforts to minimize the Reimbursable Expenses during any such suspension, but such suspension shall not affect Owner's obligation to fund Operating Expenses that cannot be reasonably avoided during such suspension, nor shall Owner be relieved of its obligation to pay the Base Fee during such suspension.

2.03 Termination & Expiration Payments.

2.03.1 Expenses & Fees.

Not later than sixty (60) days following termination of this Agreement for whatever reason or expiration of this Agreement by its terms, Operator shall submit to Owner the Final Expenses & Fees Invoice which shall describe, in detail and with supporting documentation reasonably acceptable to Owner and without duplication of any amounts in any other invoice prepared in accordance with this Agreement, the following:

- (a) any and all Authorized Reimbursable Expenses that: (i) were incurred by Operator in accordance with this Agreement and (ii) were not previously reimbursed by Owner;
- (b) all Base Fees earned by Operator in accordance with this Agreement and not previously paid by Owner, including pro-rated amounts payable with respect to the month in which termination or expiration occurs; and
- (c) any and all reasonable costs and expenses incurred by Operator in connection with the performance of its termination or expiration cooperation obligations as set forth in Section 4.17 *{regarding Operator's Successor Operator cooperation obligations}*.

Not later than thirty (30) days after receiving the Final Expenses & Fees Invoice, Owner shall pay to Operator, in immediately available funds, the total amount due, as such amount is set forth in the Final Expenses & Fees Invoice, less any portion of such amount disputed in good faith; provided, however, that the amounts due in accordance with Section 15.02(c) shall be paid as provided therein.

2.03.2 Severance.

Not later than fifteen (15) days after termination of employment by Operator or its Affiliate of one or more members of the Facility Work Force as a result of termination of this Agreement for any reason other than an Operator Event of Default or expiration of this Agreement by its terms, Operator shall submit to Owner the Severance Obligations Invoice which shall describe, in detail and with supporting documentation reasonably acceptable to Owner, the Severance Obligations incurred in connection with such employment terminations. Not later than thirty (30) days after receiving the

Severance Obligations Invoice, Owner shall pay to Operator in immediately available funds the total amount of the Severance Obligations, as such amount is set forth in the Severance Obligations Invoice, less any portion of such amount disputed in good faith.

2.03.3 Demobilization.

Not later than thirty (30) days after

- (a) suspension of the Services for whatever reason;
- (b) termination of this Agreement for any reason other than an Operator Event of Default; or
- (c) expiration of this Agreement;

Operator shall submit to Owner the Demobilization Invoice which shall describe the Demobilization Costs in detail and with supporting documentation reasonably acceptable to Owner. Not later than thirty (30) days after receiving the Demobilization Invoice, Owner shall pay to Operator in immediately available funds the total amount of the Demobilization Costs, as such amount is set forth in the Demobilization Invoice, less any portion of such amount disputed in good faith.

2.03.4 Termination Fee.

Not later than thirty (30) days after termination of this Agreement for any reason other than (a) an Operator Event of Default, (b) a termination for convenience by Owner pursuant to Section 2.02.2 following the first twelve months of this Agreement's term, or (c) the scheduled expiration of the Term or any additional 1-year renewal term, Operator shall submit to Owner the Termination Fee Invoice which shall describe the Termination Fee in a form and substance reasonably acceptable to Owner. Not later than thirty (30) days after receiving the Termination Fee Invoice, Owner shall pay to Operator in immediately available funds the Termination Fee less any portion of such amount disputed in good faith.

In the event Operator or its Affiliate enters into an agreement for operation and maintenance services for the Facility with the successor to Owner within six (6) months of the termination of this Agreement, then not later than thirty (30) days following the effective date of such services agreement, Operator shall return to Owner in immediately available funds any Termination Fee paid to Operator in accordance with this Section 2.03.4.

2.04 Surviving Provisions.

The termination or expiration of this Agreement shall not affect any rights or obligations which have arisen or accrued before such termination or expiration, including any with respect to antecedent breach. In addition, the provisions of (a) Articles X {**regarding indemnification**}, XII {**regarding liability limitations**}, and XIII {**regarding Dispute resolution**} and Sections 2.03 {**regarding payment obligations following termination and expiration**}, 3.12 {**regarding certain indemnification obligations related to operation by Owner**}, 16.10 {**regarding relationship of the Parties**}, 16.11 {**regarding integration clause**}, and 16.13 {**regarding governing law**}, shall each survive such termination or expiration indefinitely; and (b) Sections 16.04 {**regarding Confidential Information**} and 3.13 {**regarding Owner 's audit rights**}, shall each survive for a period of two (2) years following the date of such termination or expiration.

ARTICLE III

OWNER RIGHTS & RESPONSIBILITIES

3.01 Owner's Representative.

Not later than thirty (30) days following the Effective Date, Owner shall appoint an individual who shall be authorized to act for and on behalf of Owner in all matters concerning this Agreement (such individual, the "Owner's Representative"). Owner shall be bound by the communications, directions, requests and decisions made by the Owner's Representative; provided that; (i) Owner shall not so be bound unless such communications, directions, requests and decisions are made in writing; and (ii) the Owner's Representative shall not have the authority to amend any provision of this Agreement, but shall have the authority to waive provisions of this Agreement which are intended to protect Owner or create obligations for Operator, provided that no such waiver shall permit Operator to fail to comply with applicable law or shall result in increased expense or liability for Owner. Owner shall also designate at least one alternate to the Owner's Representative who shall, in the unavailability of the Owner's Representative, be authorized to act as the Owner's Representative. Owner shall deliver to Operator a written Notice of the identity of the Owner's Representative and the alternates thereto along with specific instructions as to how each such individual can be reached at all times.

3.02 Documents.

Owner shall supply to Operator true and accurate copies of any documents, materials, records, accounts reports and other information related to the Facility in the possession of, or reasonably available to, Owner that (i) arose from, is related to or is the result of the process of obtaining and maintaining Authorizations and that is useful for identifying, interpreting and establishing the manner of compliance with Applicable Laws with respect to the performance of the Services or (ii) is otherwise necessary or desirable for the performance of the Services in accordance with this Agreement. Owner's obligation to supply such documentation shall not apply in regard to any documentation developed, maintained, or otherwise in the possession of Operator, or Operator's Affiliate, pursuant to the EPC Agreement.

3.03 Utility Services.

Owner shall be responsible for providing all Utility Services required to perform the Services in accordance with this Agreement.

3.04 Authorizations.

Owner shall obtain, renew or extend, as required, all Authorizations required (i) for the performance of the Services except for those Authorizations which must be obtained by or in the name of Operator, or (ii) for the performance by Owner of any other obligation under this Agreement. Owner shall comply with all of the requirements of such Authorizations except for those requirements the fulfillment of which have been specifically made by this Agreement an obligation of Operator. If Owner does not obtain, or renew or extend, an Authorization that is required for the performance of the Services, Operator may suspend performance of the Service by written Notice to Owner to the extent that Operator may not lawfully perform the Services until such Authorization is obtained, renewed or extended, as applicable.

3.05 Environmental Liability.

Owner shall be responsible for (a) any and all Environmental Claims, other than Operator Borne Fines, except to the extent such Environmental Claims are the result of the negligence or Willful Misconduct of Operator; and (b) arranging for the collection, treatment, storage, transportation, recovery, removal, discharge and disposal of Hazardous Materials present at any time at, in or under the Facility or adjacent areas. Operator shall be responsible for defense and payment of all Environmental Claims to the extent such claims are the result of negligence or Willful Misconduct of Operator.

3.06 Fines & Penalties.

Owner shall promptly pay all Owner Borne Fines. If Owner does not pay any Owner Borne Fine when due and, as a result thereof, it would be unlawful for Operator to perform all or any portion of the Services, then Operator may suspend performance of the Service by written Notice to Owner to the extent that Operator may not lawfully perform the Services until such Owner Borne Fine has been paid. Owner may, but shall not be obligated to, pay any Operator Borne Fine; provided that (a) Operator has not complied in all material respects with the requirements of such Operator Borne Fine on or before five (5) days prior to the deadline for such compliance as set forth in such Operator Borne Fine or the corresponding Applicable Law and (b) Owner uses its Best Efforts to protect and maintain Operator's right to protest such Operator Borne Fine. Subject to the limitation of Operator's total liability under this Agreement as set forth in Section 12.04 **{regarding Operator's liability limitations}**, upon the written request of Owner, Operator shall, not later than fifteen (15) days after receiving such request, pay Owner in immediately available funds an amount equal to all Losses incurred by Owner in paying an Operator Borne Fine.

3.07 Additional Agreements.

Owner shall deliver to Operator a written Notice of any Additional Agreement. Upon Operator's approval of any provision of such Additional Agreement that affects (a) the Facility, (b) Operator, its Affiliates, or their respective Representatives or (c) the performance of the Services, Operator shall comply with the requirements of the applicable provisions of the Additional Agreement in the performance of the Services.

3.08 Notifications.

Upon obtaining knowledge thereof, Owner shall as soon as practicable, but no later than five (5) days after obtaining such knowledge, deliver to the Operator a written Notice of the following:

- (a) any litigation, claim, dispute, action or proceeding concerning the Facility, Operator, its Affiliates or the Services, which is either pending or threatened and material;
- (b) any refusal, or material threat of refusal, to grant, renew, or extend, or any pending litigation, claim, dispute, action or proceeding that might, in the reasonable opinion of Owner, affect the granting, renewal or extension of any Authorization;
- (c) any incident requiring notification of any Governmental Authority in accordance with Applicable Law;
- (d) any notice from any Governmental Authority of any inspection of the Facility; and
- (e) any other event or circumstance that could be expected, in the reasonable opinion of Owner, to have a material adverse effect on the Facility, Operator or the performance of the Services.

3.09 Taxes.

Owner shall promptly pay when due all taxes, duties, levies and other similar assessments related to the Facility, including sales and gross receipts taxes, assessed by a Governmental Authority against the Facility, a Party or such Party's Affiliates except for (a) taxes assessed against Operator or its Affiliates as a result of their respective net taxable income; (b) franchise or similar taxes assessed against Operator or its Affiliates; and (c) taxes being contested in good faith by appropriate procedures.

3.10 Audits.

Notwithstanding any payment made by Owner or by Operator as an agent of Owner, Owner shall remain entitled to review and audit all:

- (a) records and reports prepared by Operator in accordance with this Agreement;
- (b) amounts paid by Operator directly, or as an agent of Owner, in accordance with this Agreement;

together with any supporting documentation, for a period of two (2) years from and after the last day of the year in which such records and reports were prepared or withdrawals or payments were made. If, pursuant to such review and audit, it is determined that any amount previously paid by Operator directly, or as an agent of Owner, was done so in violation of this Agreement, Owner may submit a claim to Operator indicating the amount of the challenged payment and the reasons for such challenge. Operator shall, not later than thirty (30) days after receiving written Notice of such claim, pay Owner in immediately available funds an amount equal to that portion of the challenged payment not disputed by Operator in good faith. Notwithstanding any other provision of this Agreement to the contrary, Owner shall have no right to offset any amounts due Owner in accordance with this Section 3.10 against any other amounts Owner is obligated to pay Operator.

3.11 Operation by Owner.

In the event, for a period exceeding thirty (30) consecutive days, Operator fails to operate the Facility at all or substantially all of its full capacity as a result of (a) an unplanned outage due to a breach of this Agreement by Operator or (b) a strike or other form of labor action by Facility Work Force personnel, Owner shall have the right to (x) intervene and attempt to remedy such failure, (y) assume care, custody and control for operation and maintenance of the Facility and (z) retain such other Persons as Owner, in its sole reasonable discretion, deems necessary or advisable for such purposes. Owner shall defend, indemnify and hold harmless Operator, its Affiliates and their respective Representatives from and against any and all Losses which arise out of or in connection with Owner's operation and maintenance of the Facility as provided for in this Section 3.11.

ARTICLE IV

OPERATOR RIGHTS & RESPONSIBILITIES

4.01 Scope of Services.

Operator shall perform the Services in accordance with this Agreement. The Services shall include:

- (a) staffing, training, directing, supervising and otherwise managing the Facility Work Force

personnel as required to perform the Services in accordance with this Agreement;

(b) directing and supervising the work of Operator's Affiliates engaged by Operator to perform any portion of the Services;

(c) procuring in its own name, or in the name of Owner as Owner's agent, all goods and services required to perform the Services in accordance with this Agreement;

(d) coordinate the dispatch of the Facility with Owner's dispatch coordinator;

(e) coordinating the activities of Third Party Suppliers, including administering procurement agreements;

(f) performing such other services or doing such other work as described in the applicable Operating Plan & Budget, or as Owner may otherwise reasonably request and for which Owner has approved all additional costs and expenses incurred as a consequence thereof.;

(g) Prepare and deliver to Owner the Operating Plan & Budget for each Fiscal Year of the Term at least 60 days prior to the commencement of each Fiscal Year;

(h) during the pendency of any Force Majeure, (i) taking reasonable steps to respond to eliminate the effect of such Force Majeure, and (ii) maintaining sufficient personnel and materials to be able to commence operation and maintenance services promptly upon the resolution of such Force Majeure; and

(i) Enforcing any existing or new warranties on the Facility and its components provided pursuant to the commencement of the Agreement. Operator will use its Best Efforts to identify any defect in the Facility that would be covered by any such warranty prior to the expiration of such warranty.

4.02 Performance Standards.

Operator shall perform the Services in accordance with:

(a) all Applicable Laws and Authorizations;

(b) this Agreement;

(c) the Facility Manuals;

(d) the pre-existing or applicable Operating Plan & Budget;

(e) Industry Standards and Practices;

(f) the requirements of the insurance underwriters insuring the Facility and the Parties in connection with their Facility related activities;

(g) Manufacturer's Recommendations; and

(h) any other reasonable request made by Owner and reasonably acceptable to Operator and for which Owner has approved all costs and expenses incurred as a consequence thereof.

4.03 Personnel.

All individuals employed by Operator or its Affiliates to perform the Services shall be qualified to perform the duties to which they are assigned. Such qualifications shall include the possession and maintenance of any individual or personal licenses or permits required by Applicable Law.

The Parties shall cooperate on all responses to organized labor, including organization efforts, contract negotiations, dispute resolutions, grievances, strikes and lockouts.

The previous paragraph notwithstanding, subject to the limitations of the applicable Operating Plan & Budget, and Owner's right to approve the selection of the Plant Manager, Operator shall have,

with respect to its employees and those of its Affiliates, the sole reasonable right to manage labor relations and determine working hours, employee benefits, rates of compensation and all other personnel related matters. If in Operator's reasonable judgment it is necessary to increase the amount of operating personnel to reliably meet the dispatch requirements of the Facility, Operator shall do so, within the limitations of the applicable Operating Plan and Budget.

4.04 Plant Manager.

Operator's selection of the Plant Manager shall be subject to the approval of Owner, which approval shall not be unreasonably withheld or delayed. The Plant Manager shall (a) be authorized to act for and on behalf of Operator in all matters concerning performance of the Services and (b) direct and manage Operator's resources in the performance of the Services. Operator shall be bound by the communications, directions, requests and decisions made by the Plant Manager; provided that the Plant Manager shall have no authority to amend or waive any provision of this Agreement. Owner shall also designate at least one alternate to the Plant Manager who shall, in the unavailability of the Plant Manager, be authorized to act as the Plant Manager and who's selection shall be subject to the approval of Owner. Operator shall deliver to Owner a written Notice of the identity of the Plant Manager and the alternates thereto along with specific instructions as to how each such individual can be reached at all times.

4.05 Training.

Subject to the limitations of the applicable Operating Plan & Budget, and this Agreement, Authorized Operating Expenses shall include all costs and expenses incurred by Operator in connection with its training programs, including:

- (a) Labor Expenses for non-Facility Work Force personnel of Operator and its Affiliates;
- (b) reasonable travel and living expenses incurred by such individuals in the performance of such services; and
- (c) all costs of Third Party Suppliers engaged by Operator in connection with such training programs.

Operator shall provide an ongoing training program for the Facility Work Force personnel, which shall be described in greater detail in the Facility Manuals. This training program shall include an orientation element and emphasize, among other things, safety, environmental compliance, operation and maintenance skills and the fundamental economics of the Facility. The Parties acknowledge that off-site plant manager's meetings (up to four per year) and an annual off-site safety meeting, or their equivalent, are essential parts of an effective training program.

4.06 Procurement.

4.06.1 General.

All goods required for performance of the Services in accordance with this Agreement shall be procured by Operator in accordance with this Agreement. All services required for performance of the Services in accordance with this Agreement that the Facility Work Force personnel are either unavailable or unqualified to supply directly, shall be procured by Operator in accordance with this Agreement. All such procurements shall also be in accordance with and subject to the limitations of the applicable Operating Plan & Budget. Operator shall include in each Operating Plan & Budget:

- (a) a brief description of all major goods and services to be procured during the period

covered by the applicable Operating Plan & Budget;

- (b) a list of previously qualified and pre-approved Third Party Suppliers; and
- (c) standard terms and conditions for the procurement of goods and services from Third Parties Suppliers.

Operator shall prepare and include, as part of each supply agreement, specifications and other terms and conditions, including, if deemed appropriate by Operator, minimum performance and warranty requirements.

4.06.2 Operator Affiliate Supply Agreements.

All goods and services supplied by an Affiliate of Operator shall be supplied in accordance with a written agreement between Operator and the supplier. All such supply agreements shall be subject to the approval of Owner.

4.06.3 Third Party Supply Agreements.

All goods and services provided by a Third Party Supplier shall be supplied in accordance with an agreement between Owner and such Third Party Supplier. Such supply agreements shall be negotiated and executed by Operator as Owner's agent. Operator shall have no contractual liability to any Third Party Supplier. The provisions of any such supply agreement which is not an Authorized Operating Expense shall require the prior written approval of Owner.

Supply agreements with Third Party Suppliers shall include supply specifications and such other terms and conditions as reasonably deemed appropriate by Operator including one or more of the following:

- (a) performance requirements;
 - (b) a requirement that the Third Party Supplier's performance be in accordance with Industry Standards and Practices and be free of its negligence and willful misconduct;
 - (c) a requirement for appropriate quality control and assurance practices and procedures;
 - (d) warranty, breach of warranty and breach of contract provisions;
 - (e) a requirement that the Third Party Supplier carry insurance protection consistent with the insurance requirements of this Agreement or as otherwise deemed appropriate by Operator;
 - (f) a requirement for payment and performance bonds, retainage, or comparable alternative;
- and
- (g) a limitation on Owner's liability of not greater than the value of the goods or services provided as set forth in the applicable supply agreement.

4.06.4 Competitive Bids.

Operator shall prepare a written request for bids for each procurement of goods or services (other than Utility Services) with a term greater than one (1) year or an estimated purchase price or contract value in excess of the lesser of (i) \$50,000 (which limit shall be adjusted effective each January 1 during the Term, beginning with January 1, 2012, by the same percent as the percent change in the Escalation Factor for the twelve (12) month period ending with the most recent December 31), or (ii) such lower limit as may be provided by law. Such requests shall include

- (a) the minimum specification requirements;
- (b) the terms and conditions of the supply agreement;

- (c) a request for a quotation for providing the requested goods or services; and
- (d) a request for the Third Party Supplier's qualifications and experience.

Operator shall evaluate all responses and select the successful bidder. Prior to the execution thereof, Operator shall obtain Owner's written approval for each supply agreement with

- (a) a value in excess of \$50,000 (which limit shall be adjusted effective each January 1 during the Term, beginning with January 1, 2012, by the same percent as the percent change in the Escalation Factor for the twelve (12) month period ending with the most recent December 31); or
- (b) terms and conditions materially different than the standard terms and conditions as set forth in this Agreement or the applicable Operating Plan & Budget.

For all supply agreements requiring Owner's prior approval, Operator shall prepare a summary of the responses to Operator's request for bids and a description of the terms and conditions of the supply agreement to the extent such terms and conditions are materially different than the standard terms and conditions as set forth in this Agreement or contained within the applicable Operating Plan & Budget.

4.06.5 Supply Agreement Administration.

Operator shall administer all agreements for the supply of goods and services procured by Operator in accordance with this Section 4.06, including:

- (a) scheduling and coordinating the work, including the delivery of goods;
- (b) inspecting all goods and services for compliance with the supply agreement specifications and other terms and conditions;
- (c) enforcing material supply agreement terms and conditions, including warranty provisions; and
- (d) advising Owner of any potential material claims against a Third Party Supplier for such Third Party Supplier's failure to perform in accordance with such supply agreement, and assisting Owner in investigating, pursuing, preserving and litigating or arbitrating, if necessary, such claims; provided that Operator shall not be required to instigate or maintain any litigation or arbitration proceeding in connection with any Third Party Supplier Agreement.
- (e) As deemed reasonably appropriate by Operator to mitigate the consequences of a Third Party Supplier's failure to perform and subject to the prior approval of Owner, or as directed by Owner, Operator shall retain a qualified independent expert to inspect goods and services for quality control purposes and for compliance with the applicable supply agreement specifications and other terms and conditions.

4.06.6 Supplier Invoices.

Operator shall promptly review and approve invoices from Third Party Suppliers. No less often than once every week during the Term, Operator shall forward to Owner for payment all Third Party Supplier invoices not found by Operator to be in conflict with the corresponding procurement agreement together with a brief summary of each Third Party Supplier invoice conflict. Operator shall endeavor to resolve any Third Party Supplier invoice conflicts or errors as quickly as is reasonably practicable.

4.06.7 Supplier Insurance.

Prior to any Third Party Supplier beginning work at the Facility, Operator shall obtain certificates that verify the existence of insurance protection required by the applicable supply agreement. Operator shall arrange for transportation insurance to cover the replacement value of any goods damaged or lost during the transportation of such goods to the Site to the extent such insurance protection is not provided by the supplier or shipper of such goods.

4.06.8 Emergencies.

Nothing in this Section 4.06 shall be deemed to limit Operator's rights or obligations to respond to Emergencies as set forth herein or to restrict Operator's ability to contract directly, or indirectly as Owner's agent, for goods or services required for responding to an Emergency.

4.07 Execution Of Documents.

Any agreement, contract, notice or other document that is expressly permitted by this Agreement, or by written approval of Owner, to be executed by Operator on behalf of or as agent for Owner shall be executed by the Plant Manager or, subject to prior written Notice to Owner, such other representative of Operator approved by Owner.

4.08 Records and Reports.

4.08.1 Financial.

Operator shall maintain complete and accurate financial records associated with performing the Services. Operator shall prepare and deliver to Owner financial reports in a form and at intervals reasonably requested by Owner. Unless otherwise instructed by Owner, Operator shall keep all such financial records in a safe and secure place for a period of no less than three (3) Years. Such records and financial reports (i) shall be prepared in accordance with **GAAP** and the accounting requirements of the Federal Energy Regulatory Commission, and (ii) shall be maintained on the basis of the Fiscal Year.

4.08.2 Performance.

Operator shall maintain accurate written records of the performance of the Facility, including records associated with operation and maintenance, environmental compliance and safety incidents as are required by Applicable Law. Operator shall prepare and deliver to Owner performance reports in a form and at intervals reasonably requested by Owner. Unless otherwise instructed by Owner, Operator shall keep all performance-related records in a safe and secure place for a period of no less than three (3) Years.

4.08.3 As-Built Plans & Specifications.

Operator shall maintain in a safe and secure place the Facility as-built plans provided pursuant to the EPC Agreement, and the plans and specifications for major modifications or additions to the Facility made by Operator pursuant to the terms hereof.

4.09 Facility Manuals.

Operator shall, from time to time, amend the Facility Manuals to reflect changes to the Facility, Applicable Law and Industry Standards and Practices. The Facility Manuals, and any amendments or

supplements thereto, shall be subject to review and comment by Owner. The Facility Manuals are the property of Owner and shall remain at the Facility upon termination or expiration of this Agreement; provided that Operator shall retain all copyrights to those portions of the Facility Manuals prepared initially by Operator, and Owner shall have no right to distribute or otherwise use such Operator prepared materials except in connection with the operation and maintenance of the Facility.

4.10 Authorizations.

Operator shall apply for, obtain and maintain all Authorizations which are required under Applicable Law to be obtained and maintained by Operator, its Affiliates or their respective Representatives in order for Operator to perform the Services. Operator shall, at Owner's request, assist Owner in applying for, obtaining and maintaining Authorizations obtained and maintained by Owner in accordance with Section 3.04 *{regarding Owner's Authorizations obligations}*.

4.11 Operator Borne Fines.

Operator shall pay and comply with all of the requirements of Operator Borne Fines on or before the deadline for compliance, and shall use its Best Efforts to avoid or mitigate any adverse impact of Operator Borne Fines on the Facility, Owner, its Affiliates, their respective Representatives, or the performance of the Services.

4.12 Community Relations.

Operator shall at all times conduct itself and perform the Services in a manner that reflects positively on the Owner within the local community. At least once per year, Operator shall meet with local law enforcement, fire protection and health care provider officials to review the activities that take place at the Facility and the response to situations, including Emergencies, that might involve such community services. Operator shall give notice to the Owner's Representative of such planned meetings with local community agencies. Operator shall refer all media inquiries to Owner.

4.13 Site Security.

Operator shall arrange for around-the-clock security for the Site. Such security shall limit access to the Site to Governmental Authorities and individuals authorized by Owner or Operator. Operator shall maintain perimeter fences and lighting to discourage unauthorized entry to the Site.

4.14 Notifications.

Upon obtaining knowledge thereof, Operator shall, as soon as practicable, but no later than five (5) days after obtaining such knowledge deliver to Owner a written Notice of the following:

- (a) any litigation, claim, dispute, action or proceeding by any Person, concerning the Facility, a Party or the Services that is either pending or threatened and material;
- (b) any (i) suspension or revocation, (ii) refusal to grant, renew, or extend, or (iii) pending litigation, claim, dispute, action or proceeding, in each such case that might, in the reasonable opinion of Operator, result in the suspension or revocation, or affect the granting, renewal or extension of any relevant Authorization;
- (c) any bona fide or material threat of (i) a suspension or revocation, (ii) a refusal to grant, renew, or extend, or (iii) litigation, claim, dispute, action or proceeding, that, in each case, is likely, in the reasonable opinion of Operator, to result in a suspension or revocation, or affect the granting, renewal or extension, of any Authorization;

- (d) any imposition of any Owner Borne Fine or any Operator Borne Fine;
- (e) any Emergency;
- (f) any Force Majeure;
- (g) any unscheduled Facility outage and any acceleration, postponement or extension of a scheduled Facility outage;
- (h) any incident of death or serious injury or damage at the Site or that is likely, in the reasonable opinion of Operator, to have a material adverse effect on the Facility, a Party or the performance of the Services in accordance with this Agreement;
- (i) any incident requiring notification of any Governmental Authority in accordance with Applicable Law;
- (j) any notice from any Governmental Authority of any inspection of the Facility or Facility related records;
- (k) any potential shortage of Utility Services which Owner is required to make available in accordance with Section 3.03 {regarding Owner's Utility Services supply obligations};
- (l) any Tax assessed against a Party, its Affiliates or their respective Representatives for which Operator is or may be entitled to reimbursement in accordance with Section 3.1 1 *{regarding Owner 's tax payment obligation}*;
- (m) any unauthorized access to the Site or other breach of Site security;
- (n) any actual or threatened labor dispute related to the Facility;
- (o) any material violation of any Authorization or Applicable Law;
- (p) any material damage to any component of the Facility; and
- (q) any other event or circumstance that could be expected, in the reasonable opinion of Operator, to have a material adverse effect on the Facility, a Party or the performance of the Services.

4.15 Emergency Actions.

- (a) Owner and Operator shall jointly develop an Emergency Response Plan. The Parties shall use their Best Efforts to complete the Emergency Response Plan by March 1, 2012.
- (b) In the event of an Emergency, Operator
 - (i) shall take prompt action, in accordance with Applicable Law, Industry Standards and Practices, and the Emergency Response Plan, to attempt to stabilize the situation and avoid or mitigate damage, injury or loss;
 - (ii) notwithstanding any other provision of this Agreement to the contrary, may incur any reasonable expenditure or take any other action as Operator reasonably deems necessary or appropriate as required to achieve the objectives set forth in clause (i) of this Section 4.15(b), and such expenditures shall be deemed to be Authorized Operating Expenses; provided that Operator shall, to the extent practicable in light of the circumstances constituting the Emergency, use its Best Efforts to minimize such expenditures and obtain Owner's prior approval of such expenditures; and
 - (iii) shall include within the notification of Owner required by Section 4.14 *{regarding Operator's notification obligations}* a description of the Emergency, any response proposed or taken by Operator, any expenditures incurred by Operator, or expected to be incurred by Operator, in connection with such Emergency and any consequences resulting from or expected to result from such Emergency and Operator's response thereto.

4.16 Cooperation Following Termination or Expiration.

Upon the termination or expiration of this Agreement for whatever reason and subject to the timely payment of all amounts due Operator in accordance with this Agreement, Operator shall (a) turn over operation and maintenance of the Facility to the Successor Operator; and (b) execute and deliver documents and take other actions, in each case as necessary to facilitate the orderly transition of duties from Operator to the Successor Operator, including:

- (a) promptly deliver to Owner or the Successor Operator (if so directed by Owner), all work, property and recorded information, which are in Operator's possession or under its control, including the Facility Manuals and the records prepared in accordance with Section 4.08 *{regarding Facility-related financial and performance records}*;
- (b) use its Best Efforts to transfer, or cause the transfer, to Owner or the Successor Operator (if so directed by Owner), all rights and obligations of Operator, its Affiliates and their respective Representatives under all contracts entered into and Authorizations held by such Person in connection with the performance of the Services; provided that Owner shall assume, or shall cause the Successor Operator to assume, all such rights and obligations;
- (c) use its Best Efforts to transfer to Owner or the Successor Operator any current collective bargaining agreements; and

Upon the termination of this Agreement for reasons other than an Owner Event of Default and subject to Owner's timely payment of amounts due Operator in accordance with this Agreement, Operator shall, at the reasonable request of Owner and for a reasonable period not to exceed thirty (30) days, train the Successor Operator.

4.17 Additional Services.

Owner may request that Operator provide goods and services the costs of which are not included in the applicable Operating Plan & Budget or otherwise previously approved by Owner (the "Extra Work"). Upon any such request, Operator shall, as soon as reasonably practical, prepare and submit to Owner a written proposal for performing the Extra Work in accordance with this Agreement. Such proposal shall reflect the use of Facility Work Force personnel to perform the Extra Work at no additional cost to Owner to the extent such personnel are available during normal working hours and qualified to perform the Extra Work. Such proposal shall also include proposed amendments to the applicable Operating Plan & Budget and any proposed amendments or waivers of this Agreement required to comply with Owners request for the Extra Work. Upon Owner's approval of Operator's proposal, Operator shall perform the Extra Work in accordance with such approval and this Agreement. In the event the Extra Work, on a cumulative basis, constitutes a material change in scope of work, personnel or overall responsibilities of Operator, the Base Fee shall be increased to appropriately compensate Operator for such increased responsibilities or scope of work.

4.18 Liens or Encumbrances.

Operator shall keep and maintain the Facility free and clear of all liens and encumbrances resulting from performance of the Services to the extent such Services are performed directly by Operator or its Affiliate and not by a Third Party Supplier in accordance with an agreement between Owner and such Third Party Supplier; provided that all amounts owing to Operator under this

Agreement shall have been properly paid. At Owner's request, Operator shall assist Owner in removing liens and encumbrances filed against the Facility by Third Party Suppliers.

4.19 Authority Limitations.

Notwithstanding any provision in this Agreement to the contrary, unless specifically provided for in the applicable Operating Plan & Budget, or as otherwise specifically approved or directed by Owner in writing, Operator shall not directly, or as an agent of Owner, and shall ensure that its Affiliates and their respective Representatives do not:

- (a) sell, lease, pledge, mortgage, convey, or make any license, exchange or other transfer or disposition of any property or assets of Owner, its Affiliates or their respective Representatives, including any property or assets purchased by Operator in accordance with this Agreement;
- (b) make, enter into, execute, amend, modify or supplement **any** contract or agreement (including any labor or collective bargaining agreement) on behalf of or in the name of Owner except as specifically provided for in Sections 4.06 *{regarding Operator's procurement obligations}* and 4.15 *{ regarding Operator's Emergency response obligations}*;
- (c) incur, consent to or agree to any cost or expense directly or as agent of Owner that is to the account of Owner or its Affiliates, or otherwise recoverable from such Person, except for Authorized Operating Expenses;
- (d) settle, compromise, assign, pledge, transfer, release or consent to the compromise, assignment, pledge, transfer or release of, any claim, suit, debt, demand or judgment against or due by, Owner or Operator, the cost of which is to the account of Owner or its Affiliates, or otherwise recoverable from such Persons; or submit any such claim, dispute or controversy to arbitration or judicial process, or stipulate in respect thereof to a judgment, or consent to do the same;
- (e) engage in any other transaction on behalf of or as an agent for Owner except as specifically provided for in this Agreement or as specifically directed by Owner in writing; or
- (f) issue or make any public announcements or statements regarding the Facility, Owner, its Affiliates, the Services or this Agreement, other than announcements or statements required by law or by the requirements of any securities exchange, unless, prior thereto, Owner has been furnished with a copy thereof and has approved the same; provided that Operator may, without Owner's approval, disclose in its promotional literature its participation as contract operator of the Facility and a brief description of the Facility and the Services.

ARTICLE V

BUDGET & OPERATING PLAN PROCEDURES

5.01 Operations Period.

5.01.1 Proposed Operating Plan & Budget.

Not later than (15) days prior to the commencement of this Agreement and thereafter not later than April 1 of each Fiscal Year during the Term, Operator shall prepare and deliver to Owner the Proposed Operating Plan & Budget for performing the Services during the period beginning with the

commencement of the Agreement and for the remainder of the Fiscal Year in which such date occurs, in the first instance, and during the following Fiscal Year in each subsequent case. The Proposed Operating Plan & Budget shall be prepared in accordance with Industry Standards and Practices and in a form and substance reasonably satisfactory to Owner. The operating plan component of the Proposed Operating Plan & Budget shall include:

- (a) any staffing plan revisions;
- (b) in accordance with the requirements of Paragraph 3.06 of Appendix B *{regarding EHS matters}*, a description of the environmental, health and safety related objectives for the applicable Fiscal Year;
- (c) a description of the proposed Services that will result in Non-Recurring Operating Expenses, (including (i) plant betterments and other capital improvements, additions, replacements and alterations and (ii) major maintenance repairs and replacements) for the next Fiscal Year;
- (d) a description of the Services, and proposed budget, to be performed by an Affiliate of Operator on a cost recoverable basis during the period to which the Proposed Operating Plan & Budget applies;
- (e) a list of the Third Party Suppliers to be engaged to provide goods or services during the period to which the Proposed Operating Plan & Budget applies together with a description of the scope of each such Third Party Supplier's work, its qualifications for performing such work and the terms and conditions of the supply agreement;
- (f) the standard terms and conditions for agreements with Third Party Suppliers; and
- (g) any other information which Owner may reasonably request be included in the Proposed Operating Plan & Budget.

The budget components of the Proposed Operating Plan & Budget shall include:

- (a) an estimate, on a monthly as well as an annual basis, of the Reimbursable Expenses to be incurred during the applicable period in connection with performance of the Services;
- (b) a reasonable contingency, separately identified and quantified, including a significant contingency for additional operating personnel in the event that Operator deems it necessary or advisable to increase the Facility Work Force as described in Section 4.03; and
- (c) an allowance for the Facility Work Force Incentive.

5.01.2 Operating Plan & Budget Approval.

- (a) Not later than fifteen (15) days, in the first instance, and thirty (30) days in each subsequent case, after receiving the Proposed Operating Plan & Budget, Owner shall either approve the Proposed Operating Plan & Budget in accordance with Industry Standards and Practices or provide Operator in writing with its reasons for withholding approval and the changes required to obtain Owner approval. Any Disputes regarding the Proposed Operating Plan & Budget not resolved by the Parties within fifteen (15) days, in the first instance, and thirty (30) days, in each subsequent case, following Operator's receipt of Owner's comments shall be resolved in accordance with Article XIII *{regarding Dispute resolution}*; provided, however, that Operator shall not be obligated to agree to, and the arbitrators shall not have authority to recommend, an Operating Plan

& Budget that does not include sufficient funds to enable Operator to purchase the insurance that Operator is required to carry pursuant to Section 9.02, subject however to the requirement that the cost of such insurance, as proposed by Operator, is reasonable and otherwise in accordance with Industry Standards and Practices, in each case for insurance coverage of the type and at the level described in Section 9.02. The portions of the Proposed Operating Plan & Budget approved by the Parties shall constitute the Operating Plan & Budget respectively for the applicable Fiscal Year.

- (b) During the course of each Fiscal Year, the Parties agree to amend, from time to time, the Operating Plan & Budget for such Fiscal Year as appropriate to reasonably account for, in a timely manner, unanticipated circumstances, including changes in Applicable Law, Emergencies, and Force Majeure.

5.01.3 Default Budget.

Beginning with the Fiscal Year following the Fiscal Year in which the commencement of the Agreement occurs, if the Parties have not agreed upon a budget to be included in as part of the Operating Plan & Budget by April 1 of the Fiscal Year to which such Operating Plan & Budget applies, then the Default Budget shall be deemed to be the approved budget component of the Operating Plan & Budget for the immediately preceding Fiscal Year until such time as the Parties agree on a budget for such Fiscal Year or the budget-related Disputes between the Parties have been resolved in accordance with Article XIII *{regarding Dispute resolution}*. The Default Budget shall be prepared by Operator and delivered to Owner not later than seven (7) days prior to the first day of the period to which the Default Budget applies. The Default Budget, which shall be prorated for the Fiscal Year in which this Agreement is terminated or expires, shall be equal to the actual Operating Expenses incurred during the preceding Fiscal Year (annualized in the event such preceding Fiscal Year is less than a full year) increased by the same percent as the percent increase, if any, in the Escalation Factor during the twelve month period ending with the most recent December 31, and adjusted to (a) delete any Non-Recurring Operating Expense incurred during the preceding Fiscal Year, if such non-recurring expense, in the reasonable opinion of Operator, is not expected to be incurred during the applicable Fiscal Year, (b) add any Non- Recurring Operating Expense scheduled to be incurred during the applicable Fiscal Year as such amount is set forth in the most recent Operating Plan & Budget and (c) delete (without duplication of the adjustments made in accordance with (a) and (b) of this Section 5.01.3) the impact of any Emergency, Force Majeure, Owner Borne Fine or suspension of Services that occurred during the preceding Fiscal Year.

ARTICLE VI

FEE AND OPERATING EXPENSE PROCEDURES

6.01 Operator Invoice

- (a) Not later than the fifth day of each month beginning with the month following the month in which the commencement of the Agreement occurs and ending with the month following the month in which this Agreement expires by its terms or is terminated, Operator shall prepare and deliver to Owner the Operator Invoice in a form and substance

reasonably acceptable to Owner.

Operator will invoice for the Base Fee for providing the Services during the previous month and Reimbursable Expenses due and payable as of the end of previous month. The Base Fee shall be prorated for any partial month and increased effective each January 1 during the Term, beginning with January 1, 2013, by the same percent as the percent increase, if any, in the Escalation Factor during the twelve (12) month period ending with the most recent December 31. Not later than twenty-five (25) days after the Operator Invoice is delivered to Owner (the "Due Date" for such invoice), Owner shall pay to Operator an amount, in immediately available funds, equal to the Base Fee, as such amount is set forth in the applicable Operator Invoice and undisputed Reimbursable Expenses plus administrative fees. At the same time, Owner shall deliver to Operator a description of any disputed Operating Expenses and the basis for such disputes.

6.02 Payment and Interest.

- (a) Payment. If Owner, in good faith, disputes a portion of any invoice, the Owner shall render payment for the undisputed portion of such invoice to the Operator by the Due Date, and the disputed portion shall not be due until the resolution of such dispute. Upon resolution of the dispute, any amount found to be due and payable to the Operator shall be due and payable not later than twenty (20) days after such resolution. The Owner shall render payment by wire transfer, or such other payment method as the Parties mutually agree upon.
- (b) Interest.
 - (i). If the Owner fails to pay all or a portion of the undisputed amounts invoiced within the time stated in Paragraph (a) hereof, the Owner shall owe interest on the unpaid portion of the invoice, which interest shall accrue daily at the Overdue Payment Rate, from the Due Date until paid.
 - (ii). If any portion of a disputed amount is ultimately determined to be due to the Operator, such amount shall be due and payable not later than ten (10) days after resolution of the dispute, and the Owner shall owe interest on such portion of such disputed amount to the extent that such portion is determined to be due and owing to the Operator, which interest shall accrue daily at the Overdue Payment Rate, from the original Due Date of such amount until such amount is paid.
 - (c) No Set-off. All payments made by either Party shall be free and clear of, and without any deduction for or on account of, any set-off, counterclaim, or other liability to the billing Party, except to the extent required by applicable Federal or state law.

6.03 Unauthorized Expenditures.

In the event Operator incurs directly, or indirectly as agent of Owner, any Operating Expense that is not an Authorized Operating Expense, in violation of this Agreement, such cost or expense shall, subject to the limit of Operator's total liability as set forth in Section 12.04 *{regarding Operator's total*

liability limitation}, be for the account of Operator and not entitle Operator to reimbursement by Owner. Any cost or expense incurred directly, or as agent of Owner, in violation of this Agreement and paid by Operator in accordance with this Section 6.05 shall not be, or deemed to be, a breach of this Agreement.

6.04 Force Majeure Adjustment.

During the first three (3) months of the continuation of a Force Majeure event, there shall be no adjustment hereunder of the Base Fee on account of such Force Majeure. Thereafter during the continuation of the Force Majeure, the Base Fee shall be reduced by twenty percent (20%) for each member in the Facility Work Force terminated as a consequence of the Force Majeure; provided that in no event shall the Base Fee be reduced by more than fifty percent (50%).

ARTICLE VII

EHS MATTERS

7.01 General.

In the fulfillment of their respective obligations under this Agreement, Owner and Operator shall at all times comply fully and completely with all Applicable Law; provided, however, that Operator shall not be deemed to have breached this obligation to the extent that it operates or maintains the Facility in compliance with the Annual Operating Plan and Budget, or in accordance with the instructions of Owner (including Owner's dispatch coordinator). Additionally, Operator shall perform the Services to maximize the value of the Facility to Owner while maintaining, consistent with Industry Standards and Practices, a safe work environment and an environmentally responsible approach to performing such obligations. The previous sentence notwithstanding, Operator shall operate and maintain the Facility to standards and tolerances that accommodate reasonable fluctuations in the Facility's performance without violating Applicable Law. Appendix B *{regarding EHS matter}*) sets forth certain obligations of Owner and Operator and certain procedures with respect to EHS-related Applicable Law. Owner and Operator shall each use Best Efforts to cooperate with the other in the other's efforts to comply with this Article VII and Appendix B *{regarding EHS matters}*.

7.02 Operator EHS Rights.

In the event Owner directs Operator in a manner that Operator determines, in good faith following reasonable due diligence, could reasonably result in a violation of Applicable Law which materially exposes Operator, its Affiliates or their respective Representatives, to a material civil liability for which Operator is not, will not or cannot be indemnified by Owner, or any kind of criminal liability, then, unless and until a final ruling in favor of Owner has been made in accordance with the Dispute resolution procedures described in Article XIII *{regarding Dispute resolution}* or Operator is able to take reasonable measures required by Industry Standards and Practices to avoid such potential violation if the Owner's directive is followed, Operator shall not be required to follow such Owner directive and such failure to follow such Owner directive or the consequences therefrom shall not be, or be deemed to be, the result of (a) a breach of this Agreement, (b) Operator negligence or Willful Misconduct or (c) an Operator Event of Default, in each case, unless the arbitrators determine otherwise in accordance with Article XIII *{regarding Dispute resolution}*) and subject to the third paragraph of this Section 7.02.

In the event Owner fails to approve, in a timely manner, a reasonable request made by

Operator (including a request for approval of an Operating Expense or an addition, alteration, repair or replacement to the Facility) and Operator determines, in good faith following reasonable due diligence, that such failure could reasonably result in a violation of an Applicable Law which materially exposes Operator, its Affiliates or their respective Representatives, to a material civil liability for which Operator is not, will not or cannot be indemnified by Owner, or any kind of criminal liability, then, unless and until a final ruling in favor of Owner has been made in accordance with the Dispute resolution procedures described in Article XIII *{regarding Dispute resolution}*, Operator shall have the right to (a) act as if such Operator request had been approved by Owner; provided that such presumption of Owner approval shall not apply to any recoverable or reimbursable expenditure not otherwise previously approved by Owner or (b) suspend or modify performance of all or any portion of the Services without penalty or liability but only to the extent required to mitigate Operator's reasonable concern regarding a potential violation of Applicable Law, and neither the exercise of such rights nor the consequences therefrom shall be, or be deemed to be, the result of, (x) a breach of this Agreement, (y) Operator negligence or Willful Misconduct or (z) an Operator Event of Default, in each case, unless the arbitrators determine otherwise pursuant to Article XIII *{regarding Dispute resolution}* and subject to the third paragraph of this Section 7.02.

Notwithstanding anything to the contrary in this Agreement, the exercise by Operator of its rights under this Section 7.02 shall not be, or deemed to be, a breach of this Agreement, negligence or Willful Misconduct, and the arbitrators shall have no power to decide that Operator has acted in a manner that constitutes a breach of this Agreement, negligence or Willful Misconduct unless the arbitrator finds that Operator has not acted in good faith or exercised reasonable due diligence in making the determination to exercise its rights under this Section 7.02.

ARTICLE VIII

Omitted.

ARTICLE IX

INSURANCE

9.01 Provided by Owner.

Owner shall obtain and maintain in full force and effect for the Term insurance protection with coverage no less than the amounts set forth below.

- (a) Commercial General Liability - \$1,000,000 each occurrence and in the annual aggregate;
- (b) Umbrella Liability - \$10,000,000 in excess of (a) above for each occurrence and in the annual aggregate.
- (c) Property Damage, including Boiler and Machinery - Full replacement value of the Facility.

The insurance protection provided by Owner in accordance with this Section 9.01 shall also:

- (a) be project specific;
- (b) be in form, and be provided by insurers, acceptable to the Operator.
- (c) not have a deductible in excess of \$500,000;
- (d) name, as additional insured, Operator, its Affiliates and their respective Representatives, and Operator's officers, directors, employees, agents, subcontractors, suppliers and vendors, as each such Person's interest may appear;
- (e) be primary and non-contributory with respect to any other insurance or self insurance maintained by Operator or any additional insured; and
- (f) provide for Operator to be notified in writing at least sixty (60) days prior to any modification, termination or cancellation of insurance coverage, except that 10 days notice shall be required in the event of cancellation for nonpayment, and that a notice period of less than 60 days may be provided in the event that a 60-day notice period is not available on commercially reasonable terms.

Owner shall provide Operator with certificates of insurance that verify the full force and effect of coverage required by this Section 9.01.

9.02 Provided by Operator.

Without duplication of the insurance protection provided in accordance with Section 9.01 *{regarding insurance provided by Operator}*, Operator shall obtain and maintain in full force and effect for the Term insurance protection with coverage no less than the amounts set forth below.

- (a) Commercial General Liability -\$1,000,000 each occurrence and in the annual aggregate;
- (b) Automobile Liability -\$1,000,000 combined single limit (for owned, if any, hired and non-owned automotive equipment);
- (c) Employer's Liability -\$1,000,000 each occurrence and in the annual aggregate;
- (d) Worker's Compensation (or the local equivalent) -in such amounts and form as required by Applicable Law; and
- (e) Umbrella Liability -\$10,000,000 each occurrence and in the annual aggregate.

The policies obtained and maintained to provide the protection required by this Section 9.02 shall not necessarily be project-specific. Operator shall provide Owner with certificates of insurance that verify the full force and effect of the coverage required by this Section 9.02. The insurance protection provided by Operator in accordance with this Section 9.02 shall:

- (a) name, as additional insured, Owner, its Affiliates and their respective Representatives, and Owner's officers, directors, employees and agents;
- (b) include coverage for loss due to Operator negligence; and
- (c) provide for Owner to be notified in writing at least sixty (60) days prior to any modification, termination or cancellation of insurance coverage, except that 10 days notice shall be required in the event of cancellation for nonpayment, and that a notice period of less than 60 days may be provided in the event that a 60-day notice period is not available on commercially reasonable terms.

Operator represents and covenants that the dollar amounts of the deductibles under each insurance policy required under this Section 9.02 will not affect the coverages or the protection under each policy.

9.03 Premiums & Deductibles.

With respect to insurance coverage provided in accordance with Sections 9.01 *{regarding insurance provided by Owner}* and 9.02 *{regarding insurance provided by Operator}*:

- (a) Insurance policy premiums (including the incremental premiums paid by Operator with respect to its general corporate insurance policies that are specifically attributable to its performance of the Services) and insurance policy claim deductible amounts, except as provided for in (b) of this Section 9.03, shall be paid directly by Owner or deemed to be an Authorized Operating Expense and paid by Operator with funds withdrawn from the Operating Account; and
- (b) subject to the limitations on the total liability of Operator under this Agreement as set forth in Section 12.04 *{regarding Operator's total liability limitations}*, Operator shall pay any insurance policy claim deductible amounts to the extent that the underlying claim is the result of Operator's negligence or Willful Misconduct.

9.04 Replacement Insurance.

In the event the insurance protection required by Section 9.01 *{regarding Owner's insurance obligations}* is suspended, terminated or expires and is not promptly renewed, Operator shall have the right, subject to five (5) days advance written Notice to Owner, but not the obligation, to

- (a) acquire replacement insurance substantially in conformance with the requirements of Section 9.01 *{regarding Owner's insurance obligations}* and all reasonable costs and expenses incurred by Operator in obtaining such replacement insurance shall be deemed to be Authorized Operating Expenses; or
- (b) immediately suspend the performance of the Services and withdraw from the Site, and such suspension and withdrawal and the consequences there from shall not be, or be deemed to be, a breach of this Agreement by Operator or an Operator Event of Default;

provided that, in the case of either (a) or (b) of this Section 9.04, such actions are taken only to the extent of and for so long as there is a lapse in the insurance protection required by Section 9.01 *{regarding Owner's insurance obligations}*.

ARTICLE X

INDEMNIFICATIONS

10.01 Owner Indemnification.

Owner shall protect, defend, indemnify and hold harmless each Operator Indemnitee from and against Losses and Third Party Losses arising out of, related to or resulting from (i) the performance of the Services, or (ii) the presence of Contamination on the Site, except to the extent that such Losses or Third Party Losses arise out of or result from the negligence or Willful Misconduct by or of Operator, its Affiliates or their respective Representatives in the performance of the Services.

10.02 Operator Indemnification.

Operator shall protect, defend, indemnify and hold harmless each Owner Indemnitee from and against Losses and Third Party Losses arising out of, related to or resulting from the negligence or Willful Misconduct of Operator, its Affiliates or their respective Representatives in the performance of the Services.

10.03 Comparative Negligence.

If, due to the joint, concurring, comparative or contributory negligence or Willful Misconduct of the Parties, either Party incurs Losses or is liable for Third Party Losses, the liability for such Losses or Third Party Losses shall be allocated between Operator and Owner in proportion to their respective degrees of negligence or Willful Misconduct contributing to such Losses or Third Party Losses.

10.04 Notice and Participation.

If any Indemnified Party intends to seek indemnification under this Article from an Indemnifying Party with respect to any action or claim, the Indemnified Party shall give the Indemnifying Party written Notice of such claim or action upon the receipt of actual knowledge or information by the Indemnified Party of a possible claim or of the commencement of a claim or action, which written Notice shall in no event be delivered later than the first to occur of (a) fifteen (15) days prior to the last day for responding to such claim or action or (b) the expiration of the first half of the period allowed for responding to such claim or action. The Indemnifying Party shall have no liability under this Article for any claim or action for which such notice is not provided to the extent that the failure to give such written Notice materially prejudices the Indemnifying Party.

The Indemnifying Party shall have the right to assume the defense of any claim or action, at its sole cost and expense, with counsel designated by the Indemnifying Party and reasonably satisfactory to the Indemnified Party; provided that if the defendants in any such action include both the Indemnified Party and the Indemnifying Party, and the Indemnified Party shall have reasonably concluded that there may be legal defenses available to it which are different from or additional to those available to the Indemnifying Party, the Indemnified Party shall have the right to select separate counsel, at the Indemnifying Party's expense, to assert such legal defenses and to otherwise participate in the defense of such action on behalf of such Indemnified Party.

Except to the extent expressly provided herein, no Indemnified Party shall settle any claim or action with respect to which it has sought or intends to seek indemnification pursuant to this Agreement without the prior written consent of the Indemnifying Party.

Should any Indemnified Party be entitled to indemnification under this Article X as a result of a claim or action by a third party, and should the Indemnifying Party fail to assume the defense of such claim or action, the Indemnified Party may, at the expense of the Indemnifying Party, contest (or, with or without the prior consent of the Indemnifying Party, settle) such claim or action.

Except to the extent expressly provided herein, no Indemnifying Party shall settle any claim or action with respect to which it may be liable to provide indemnification pursuant to this Agreement without the prior written consent of the Indemnified Party; provided that if the Indemnifying Party has reached a bona fide settlement agreement with the plaintiff(s) in any such action and the Indemnified Party does not consent to such settlement agreement, then the amount specified in the settlement agreement, plus legal fees and other costs incurred prior to the date of such settlement agreement, shall act as an absolute maximum limit on the indemnification obligation of the Indemnifying Party with respect to the claim, or portion thereof, that is the subject of such settlement agreement.

10.05 Net Amount.

In the event that an Indemnifying Party is obligated to indemnify and hold any Indemnified Party

harmless under this Article X, the amount owing to the Indemnified Party shall be the amount of such Indemnified Party's actual out-of-pocket cost incurred in connection with the indemnified Losses or Third Party Losses, net of any insurance or other recovery actually received by the Indemnified Party.

ARTICLE XI

DEFAULTS & REMEDIES

11.01 Operator Events of Default.

The following shall constitute events of default on the part of Operator ("Operator Events of Default") under this Agreement:

- (a) Operator fails to pay, within thirty (30) days following the date on which such payment is due, any amount that is due to Owner under this Agreement and not disputed in good faith by Operator;
- (b) Willful Misconduct by Operator in the performance of the Services (other than in connection with a default described in Section 11.01(a)), and such Willful Misconduct has a material adverse effect on Owner, its Affiliates, their respective Representatives or the Facility, unless (i) not later than five (5) days after delivery of a written Notice from Owner of the effects of such Willful Misconduct, Operator commences and thereafter diligently pursues, to cure such Willful Misconduct and (ii) the effects of the Willful Misconduct are cured within thirty (30) days of delivery of such Notice;
- (c) Operator commits a material breach of its obligations under this Agreement (other than a default described in Section 11.01(a) or (b)) unless (i) not later than five (5) days after the delivery of a written Notice from Owner of such breach, Operator commences, and thereafter diligently pursues, to cure such breach and (ii) the effects of the breach are cured within thirty (30) days of delivery of such written Notice; provided that if (A) such breach is not, by its nature, capable of being cured within such thirty (30) day period, (B) Operator is diligently and in good faith proceeding to attempt to cure such breach, and (C) an extension of time to cure such breach would not materially increase the loss or injury suffered by the Owner, its Affiliates, their respective Representatives or the Facility on account of such breach, then Operator shall be allowed such additional time as reasonably may be required to cure such breach which shall in no event exceed one hundred eighty (180) days; and
- (d) Operator Bankruptcy or Operator ceases to carry on its business.

11.02 Owner Events of Default.

The following shall constitute events of default on the part of Owner ("Owner Events of Default") under this Agreement.

- (a) Owner fails to pay, either directly or by making deposits in the Operating Account, within thirty (30) days following the date on which such payment or deposit is due, any amount that is due to Operator or its Affiliates for (i) Base Fees or Operator Incentives

- that are not disputed in good faith by Owner or (ii) Operating Expenses incurred by Operator or its Affiliates and not disputed in good faith by Owner;
- (b) Owner commits a material breach of its obligations under this Agreement (other than in connection with a default described in Section 11.02(a) unless (i) not later than five (5) days after the delivery of a written Notice from Operator of such breach, Owner commences and thereafter diligently pursues to cure such breach and (ii) the effects of the breach are cured within thirty (30) days of delivery of such Notice; provided that if
- (A) such breach is not by its nature, capable of being cured within such thirty (30) day period,
- (B) Owner is diligently and in good faith proceeding to attempt to cure such breach, and
- (C) an extension of time to cure such breach would not materially increase the loss or injury suffered by the Operator, its Affiliates or their respective Representatives on account of such breach, then Owner shall be allowed such additional time as reasonably may be required to cure such breach which shall in no event exceed one hundred eighty (180) days; and
- (c) Owner Bankruptcy in which Operator does not receive security for the fees payable to Operator hereunder satisfactory to Operator in its sole reasonable discretion not later than twenty (20) days after receiving a written notice to the liquidator or similar officer appointed requesting such security, or Owner ceases to carry on its business.

11.03 Procedure and Remedies.

Upon the occurrence and during the continuance of an Operator Event of Default, Owner shall have the right, in its sole and absolute discretion, to do either or both of (a) terminate this Agreement subject to delivery of a written Notice to Operator of such termination not later than thirty (30) days prior to the effective date of such termination and (b) subject to Section 12.04 *{regarding Operator's total liability limitation}*, pursue any and all other remedies available at law or in equity.

Upon the occurrence and during the continuance of an Owner Event of Default, Operator shall have the right, in its sole and absolute discretion, to do either or both of (a) terminate this Agreement subject to delivery of a written Notice to Owner of such termination not later than thirty (30) days prior to the effective date of such termination and (b) pursue any and all other remedies available at law or in equity.

Notwithstanding any other provision of this Agreement to the contrary, (a) Owner shall not terminate this Agreement following the occurrence of an Operator Event of Default if, prior to Operator receiving the written Notice of such termination, and notwithstanding the expiration or unavailability of any cure period provided under this Agreement, Operator shall have cured the Operator Event of Default and (b) Operator shall not terminate this Agreement following the occurrence of an Owner Event of Default if, prior to Owner receiving the written Notice of such termination, and notwithstanding the expiration or unavailability of any cure period provided under this Agreement, Owner shall have cured the Owner Event of Default.

11.04 Operator Breach Limitations.

Notwithstanding anything else to the contrary in this Agreement, Operator shall not be in breach of this Agreement, and shall have no liability to Owner, to the extent that any occurrence, condition, or event that is the result of (each a "Liability Limiting Situation"):

- (a) any act or omission that is committed or omitted, as the case may be, solely upon the written direction of Owner, its Affiliates, or their respective Representatives and without the concurrence of Operator;
- (b) equipment or system failure or design deficiency, unless such failure or deficiency was caused by the negligence or Willful Misconduct of Operator acting in its capacity as operator under this Agreement;
- (c) a Force Majeure;
- (d) Owner's disapproval of Operator's reasonable request for approval of an Operating Expense;
- (e) Operator's suspension of the performance of all or any portion of the Services in accordance with this Agreement; or
- (f) a material breach of this Agreement by Owner;

provided that, in each of (a) through (e) of this Section 11.04, Operator continues to perform the Services in accordance with this Agreement except for modification of the performance standards set forth in Section 4.02 *{regarding Operator's performance standards}* required to reasonably account for the Liability Limiting Situation.

11.05 Election of Remedies.

Except as specifically limited by this Agreement and subject to Article XII *{regarding the Parties' liability limitation}*, each and every right, power and remedy of a Party, whether specifically stated in this Agreement, or otherwise existing, may be exercised concurrently or separately, from time to time, and so often and in such order as may be deemed expedient by the exercising Party, and the exercise or the beginning of the exercise of any such right, power or remedy shall not be deemed a waiver of the right to exercise, at the same time or thereafter, any other right, power or remedy. No delay or omission of a Party in the exercise of any right, power or remedy shall impair or operate as a waiver thereof or of any other right, power or remedy then or thereafter existing.

ARTICLE XII

LIABILITY LIMITATIONS

12.01 Consequential Damages.

Notwithstanding any other provision in this Agreement to the contrary, neither Party shall be liable hereunder to the other Party for any consequential or indirect loss or damage, including loss of revenues, loss of profit, cost of capital, loss of goodwill, increased operating costs or any other special, exemplary, collateral, punitive or incidental damages incurred by such other Party, its Affiliates, or their respective Representatives. Each Party further agrees that the waivers and disclaimers of liability, indemnities, releases from liability and limitations on liability expressed in this Agreement shall (a) apply at all times, whether in contract, equity, tort or otherwise, regardless of the fault, negligence (in whole or in part), strict liability, breach of contract or breach of warranty of the Party indemnified, released or whose liabilities are limited and (b) extend to the Affiliates of the other Party and their respective Representatives.

12.02 Non-Recourse.

Each Party agrees that it shall neither seek nor obtain, nor be entitled to seek or obtain any

deficiency or other judgment against any of the Affiliates of the other Party or against any of their respective Representatives or shareholders for any action or inaction on the part of such other Party's Affiliates, or their respective Representatives or shareholders, unless such action or inaction is caused by the Willful Misconduct, gross negligence or undue influence of any such Person and each Party therefore releases such Persons from such claims.

12.03 No Warranties or Guarantees.

EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, NEITHER PARTY MAKES ANY REPRESENTATIONS, WARRANTIES OR GUARANTEES TO THE OTHER, EITHER EXPRESS OR IMPLIED, WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT, AND BOTH PARTIES DISCLAIM *AND* WAIVE ANY IMPLIED WARRANTIES OR WARRANTIES IMPOSED BY LAW, INCLUDING MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

12.04 Operator's Liability.

Notwithstanding any other provision in this Agreement to the contrary, Operator's liability hereunder shall be limited as follows:

- (a) Operator shall have no liability for any Loss due to the loss of or damage to the Facility, or any other property related to the Facility in the care, custody or control of Owner or Operator (including loss or damage to spare parts and materials) except to the extent that such loss or damage is due to the negligence or willful misconduct of Operator. Operator's liability for any Loss due to the loss of or damage to the Facility, or any other property related to the Facility in the care, custody or control of Owner or Operator (including loss or damage to spare parts and materials) due to the negligence or willful misconduct of Operator shall be limited to the amount, if any, by which such Loss exceeds any claims paid by the underwriters of insurance provided in accordance with Section 9.02 {regarding insurance provided by Operator}, except as provided for in Section 9.03(b) {regarding insurance policy deductibles paid by Operator}; and Owner hereby releases Operator from any Losses up to the amount of any such insurance proceeds.
- (b) Except with respect to physical damage to the Facility or other property as provided for in Section 12.04(a), in the event that the Facility experiences a Forced Outage due to the negligence or willful misconduct of Operator, Operator's liability for any replacement energy costs of Owner attributable to such Forced Outage shall be limited to the amount by which (i) the lowest cost source of replacement power for the first hour of such Forced Outage exceeds (ii) the amount, if any, of any Operating Expenses avoided by Owner due to the Forced Outage. It is understood and agreed by the Parties that any such payment is Owner's sole and exclusive remedy for liquidated or other damages with respect to any Facility performance shortfall or failure, and it is further agreed that upon payment thereof, such remedy shall have achieved its essential purpose.
- (c) Notwithstanding any other provision in this Agreement to the contrary, the Parties each agree that Operator shall in no event be liable for any direct or indirect commercial loss or damages arising out of any agreement relating to the Facility, except as specifically provided herein.
- (d) The total aggregate liability of Operator under this Agreement, including amounts due Owner as a result of a breach of this Agreement, insurance policy deductibles, and

Operator's indemnification obligations hereunder, arising out of or in connection with the performance of the Services during the Term (including any extension or renewal thereof) shall not exceed in the aggregate the sum of Two Million Five Hundred Dollars (\$2.5 Million Dollars). The limitation of Operator's total aggregate liability under this Section 12.04 (d) shall not include (a) any claims related to the Facility paid by the underwriters of insurance policies owned by Operator or its Affiliates; (b) any liability arising out of or in connection with Operator's gross negligence or Willful Misconduct; or (c) claims against Operator by employees, agents or personnel of Operator or its Affiliates.

12.05 Assertion of Claims.

No claim of any kind shall be asserted against either Party or its Affiliates unless such claim is filed in a court of competent jurisdiction, or a demand for arbitration is made: (a) if arising out of contract, within four (4) years from the termination of this Agreement, or (b) if arising out of tort (including negligence), strict liability, or any other cause or form of action, within one (1) year from the termination of this Agreement, provided that the limitations period for an action other than one arising out of contract shall be deemed tolled with respect to a claim during any period during which a Party is not aware of the circumstances giving rise to the claim and a reasonable person would not have been so aware.

12.06 Mitigating Losses.

Notwithstanding any other provision of this Agreement to the contrary, with respect to any Loss, each Parties shall first maximize recovery of such Loss from any insurance policies of which it is a beneficiary, including the insurance required by Article IX, prior to exercising any rights or remedies it may have against the other Party.

ARTICLE XIII

DISPUTE RESOLUTION

13.01 Resolution By Senior Management.

In the event of a Dispute, either Party may require, by delivery of a written Notice to the other Party, that such Dispute be resolved by the City Manager of the City and a representative of the senior management (i.e. an officer or director) of Operator.

13.02 Resolution By An Expert.

In the event a Dispute subjected to resolution in accordance with Section 13.01 *{regarding Dispute resolution by senior management}* is not resolved within fourteen (14) days of the written request by either Party that such Dispute be so resolved, either Party may request, by delivery of a written Notice to the other Party, that such Dispute be resolved by a qualified independent expert acceptable to both Parties. If the other Party agrees to resolution of such Dispute by an independent expert, the expert shall determine the manner in which the resolution of the Dispute shall proceed and shall be asked to render a decision in writing as quickly as is reasonably practicable. The Parties agree that such proceedings shall not be deemed an arbitration and that the decision of the expert shall not be binding upon the Parties.

13.03 Binding Arbitration.

In the event a Dispute subjected to resolution in accordance with Section 13.01 *{regarding Dispute resolution by senior management}* is not resolved within fourteen (14) days of the written request by either Party that such Dispute be so resolved and

- (a) Either Party refuses to resolve the Dispute in accordance with Section 13.02 *(regarding resolution by an expert)*;
- (b) such Dispute is not resolved in accordance with Section 13.02 *{regarding resolution by an expert}*, within forty-five (45) days of a written request by either Party that such Dispute be so resolved; or
- (c) the outcome of the resolution of such Dispute in accordance with Section 13.02 *{regarding resolution by an expert}* is not acceptable to both Parties;

either Party may request, by delivery of a written Notice to the other Party, that such Dispute be resolved by binding arbitration before a panel of three arbitrators pursuant to the commercial arbitration rules of the American Arbitration Association. If such request is agreed in writing by the other Party, then the Dispute shall be resolved by binding arbitration. The Arbitration proceedings shall be held in Los Angeles, California, or other place acceptable to the Parties. The arbitrators shall be chosen as follows: The first arbitrator shall be selected by Owner, and the second arbitrator shall be selected by Operator, and the third arbitrator shall be selected by the two arbitrators so chosen within ten (10) days after the selection of the first two arbitrators, and failing agreement by the Parties within such period, either Party may apply to the American Arbitration Association in Los Angeles, California, for the appointment of a third neutral arbitrator.

No arbitration shall include any consolidation of two or more arbitration proceedings without the approval of both Parties, nor shall it include any Person other than Owner, Operator and any other Persons substantially involved in the common questions of fact whose presence is necessary for complete relief to be granted and who consented to participate in and be bound by the results of the arbitration. Any agreement by the Parties to arbitrate shall be specifically enforceable and the decision of the arbitrator shall be final and binding and a judgment may be entered upon it in accordance with the Law of the governing jurisdiction. The Arbitrators shall not have the authority to award punitive damages or to assess attorneys' fees or costs against either Party.

13.04 Litigation.

If a Dispute is not resolved by the Parties pursuant to Section 13.01 *{regarding Dispute resolution by senior management}* or Section 13.02 *{regarding resolution by an expert}* and the Parties have not agreed to arbitrate the Dispute pursuant to Section 13.03 *{regarding resolution by binding arbitration}*, then either Party may bring an action in any court having jurisdiction thereof to resolve such dispute.

13.05 Dispute Resolution Costs.

Each Party shall bear its own costs incurred in connection with the resolution of a Dispute and the costs of any arbitrator, the expert or both, as the case may be, shall be shared equally by the Parties; provided that the arbitrator or expert, as the case may be, shall have the power to require that one Party pay for all or any portion of the other Party's reasonable costs incurred in connection with the resolution of the Dispute if such arbitrator or expert deems such requirement equitable.

13.06 Continued Performance.

Pending the outcome of a Dispute being resolved in accordance with this Article XIII, both Parties shall continue to perform their respective obligations under this Agreement to the extent such obligations and the continued performance thereof are not the subject of such Dispute.

ARTICLE XIV

REPRESENTATIONS & WARRANTIES

14.01 Representations and Warranties Of Each Party.

Each Party represents and warrants to the other Party that, as of the date hereof:

- (a) it is duly organized, validly existing and in good standing under the laws of the state in which it is organized;
- (b) it possesses all requisite organizational power and authority to enter into and perform this Agreement and to carry out the transactions contemplated herein;
- (c) it has all legal power and authority to own and use its properties and to transact the business in which it engages or proposes to engage, and has, or expects to obtain prior to the commencement of the Agreement, all Authorizations necessary and required therefor;
- (d) every Authorization necessary for the execution, delivery and performance of this Agreement has been obtained and is in full force and effect, other than such Authorizations that are required for the performance of this Agreement that would not ordinarily be expected to be obtained until a later date;
- (e) this Agreement has been duly executed and delivered for it by the signatories so authorized; and this Agreement constitutes its legal, valid, and binding obligation, enforceable against it in accordance with the terms hereof, except as such enforceability may be limited by applicable bankruptcy laws, or by general principles of equity (regardless of whether such enforcement is considered in equity or at law);
- (f) its execution, delivery and performance of this Agreement (i) will not result in a breach or violation of, or constitute a default under, its organizational documents, any Authorization or any contract, lease or other agreement or instrument to which it is a party or by which it or its properties may be bound or affected; and (ii) does not require the consent, authorization or notification of any other Person, or any other action by or with respect to any other Person;
- (g) no suit, action or arbitration, or legal, administrative or other proceeding is pending or has been threatened in writing against it that would affect the validity or enforceability of this Agreement or its ability to fulfill its commitments hereunder or that would, if adversely determined, have a material adverse effect on its business or financial condition; and
- (h) it is not in breach of, in default under, or in violation of, any Applicable Law or the provisions of any Authorization, or in breach of, in default under, or in violation of, any provision of any promissory note, indenture or any evidence of indebtedness or security therefor, lease, contract, license or other agreement by which it is bound, except for any such breaches, defaults or violations which, individually or in the aggregate, could not reasonably be expected to have a material adverse effect on its business or financial condition or its ability to fulfill its commitments hereunder.

14.02 Additional Representations and Warranties By Owner.

Owner represents and warrants to Operator that, as of the date hereof and, with respect to Sections 14.02(b) and (d) through (j), continuing throughout the term of this Agreement:

- (a) it has not received, and has no actual knowledge of, any litigation, claim, dispute, action or proceeding or any bona fide or material threat of any litigation, claim, dispute, action or proceeding regarding the Facility or Owner that could have a material adverse effect on Operator or the Services;
- (b) it has, no actual knowledge of any Contamination at or near the Facility;
- (c) the City of Colton, California, is a California General Law City, organized under California law, and operating a municipal utility under the laws of the State of California, including the California Constitution and California Public Utilities Code sections 10001, et seq. (the "Act");
- (d) all acts necessary to the valid execution, delivery and performance of this Agreement, including competitive bidding, public notice, election, referendum, prior appropriation or other required procedures has or will be taken and performed as required under the Act and all ordinances, bylaws or other regulations applicable to Owner;
- (e) all persons making up the governing body of Owner are the duly elected or appointed incumbents in their positions and hold such positions in good standing in accordance with the Act and other applicable law;
- (f) entry into and performance of this Agreement by Owner are for a proper public purpose within the meaning of the Act and all other relevant constitutional, organic or other governing documents and applicable law;
- (g) the term of this Agreement does not extend beyond any applicable limitation imposed by the Act or other relevant constitutional, organic or other governing documents and applicable law;
- (h) Owner's obligations to make payments hereunder are unsubordinated obligations and such payments are (i) operating and maintenance costs (or similar designation) which enjoy first priority of payment at all times under any and all bond ordinances or indentures to which it is a party, the Act and all other relevant constitutional, organic or other governing documents and applicable law or (ii) otherwise not subject to any prior claim under any and all bond ordinances or indentures to which it is a party, the Act and all other relevant constitutional, organic or other governing documents and applicable law and are available without limitation or deduction to satisfy all of Owner's obligations hereunder; and
- (i) obligations to make payments hereunder do not constitute any kind of indebtedness of Owner or create any kind of lien on, or security interest in, any property or revenues of Owner which, in either case, is proscribed by any provision of the Act or any other relevant constitutional, organic or other governing documents and applicable law, any order or judgment of any court or other agency of government applicable to it or its assets, or any contractual restriction binding on or affecting it or any of its assets.

14.03 Additional Representation and Warranty By Operator.

Operator represents and warrants to Owner that, as of the date hereof, it has no actual knowledge of any Contamination at or near the Facility.

ARTICLE XV

Omitted.

ARTICLE XVI

MISCELLANEOUS

16.01 Access.

Owner shall grant to Operator full and complete access to the Facility.

Operator shall grant to Owner, Governmental Authorities, visitors accompanied by Owner, visitors authorized by Operator and other unaccompanied visitors with written authorization from Owner, access to the Facility; provided that:

- (a) access by Owner and such other visitors shall be (i) subject to reasonable advance written Notice delivered to Operator; (ii) terminated or prohibited during Emergencies and (iii) limited to normal business hours, except for access by Owner, its authorized Representatives or Governmental Authorities for response to Emergencies or for unannounced inspections or audits, which may, in either case, occur at any time, without advance written Notice and, in the case of Governmental Authorities, in accordance with Applicable Law;
- (b) Owner and such other visitors granted access to the Facility comply in all material respects with Operator's safety and security procedures and other reasonable requirements, and otherwise conduct themselves in a manner that does not materially interfere with the performance of the Services in accordance with this Agreement; and
- (c) all visitors granted access to the Facility shall at all times be accompanied by an authorized Representative of Owner or Operator.

16.02 Cooperation of the Parties.

Each Party shall cooperate in good faith with the other Party in its efforts to fulfill its obligations under this Agreement. To that end, (a) except as expressly provided elsewhere in this Agreement, neither Party shall unreasonably deny, condition, or withhold or otherwise delay its approval or consent upon the reasonable request for such approval or consent by the other Party and (b) each Party shall, upon written Notice from the other Party, take all actions and sign, execute and deliver all agreements, deeds, documents and other instruments, and shall use its Best Efforts to cause each of its Affiliates and their respective Representatives to take all actions and sign, execute and deliver all agreements, deeds, documents and other instruments reasonably required of it or them to carry out and give full effect to this Agreement and the rights and obligations of the Parties hereunder.

16.03 Force Majeure.

Each Party shall be excused from the performance of its obligations under this Agreement and

shall not be, or be deemed to be, in breach of this Agreement for its failure to perform any of its obligations or for the consequences from such failure, to the extent and for so long as such failure to perform such obligation is due to a Force Majeure event; provided that a Force Majeure event shall not excuse either Party from its obligation to make any payment required by this Agreement.

If either Party's claims that its ability to perform its obligations under this Agreement is affected by a Force Majeure, such Party shall (a) promptly notify the other Party of such Force Majeure and its cause and deliver to such other Party a written Notice confirming such notification as soon as reasonably practical and in any event within seven (7) days and (b) promptly provide information about the Force Majeure and its cause, including the nature, expected duration and effect of the Force Majeure, and such other information as may be reasonably requested by the other Party.

Upon the occurrence, and during the continuance, of a Force Majeure, both Parties shall use their respective Best Efforts to mitigate the effects of such Force Majeure and to promptly resume performance of their respective obligations under this Agreement.

16.04 Confidential Information.

- (a) During the Term and for two (2) years following the disclosure of Confidential Information, the Party that is affiliated with the Receiving Party agrees:
 - (i) to hold in confidence, and to cause each of its Affiliates and their respective Representatives to hold in confidence, the Confidential Information of the Disclosing party;
 - (ii) except as provided for in this Section 16.04, not to disclose, and to cause each of its Affiliates and their respective Representatives not to disclose, the Confidential Information of the Disclosing Party to third parties without the approval of the Disclosing Party and without executing a confidentiality agreement with the new receiving party in substantial conformance with the provisions of this Section 16.04;
 - (iii) to limit, and to cause each of its Affiliates and their respective Representatives to limit, the availability of the Confidential Information of the Disclosing Party to those of such Persons who, in each case, have a need to receive the Confidential Information to perform their duties;
 - (iv) to inform all other Persons that receive Confidential Information from it of the confidential nature of such information;
 - (v) to assume responsibility for the unauthorized disclosure of any Confidential Information by any of its Affiliates and their respective Representatives; and
 - (vi) upon the written request of a Person within Disclosing Party, to promptly return, or at the Disclosing Party's option, destroy, all information, including any plans, drawings, sketches, maps, design data, correspondence, or other items containing Confidential Information, furnished by the Disclosing Party, except that the Receiving Party may retain one copy of its work products for its files, to be kept confidential in accordance with the terms of this Section 16.04.
- (b) The Parties agree that the standard of care to be exercised with respect to Confidential Information shall be the standard of care which the Receiving Party uses to protect its own confidential or proprietary information.
- (c) Should any Receiving Party, in the reasonable opinion of its counsel, be required by Applicable Law, including the California Public Records Act, or by the requirements of

any securities exchange, to disclose the Confidential Information, it may do so without being in breach of this Agreement or any resulting comparable agreement; provided that such Person shall notify the Disclosing Party prior to such disclosure in order to provide an opportunity for the Disclosing Party to obtain a protective order or other confidential treatment for such Confidential Information.

- (d) Notwithstanding any other provision of this Agreement to the contrary, Owner acknowledges that Operator, its Affiliates and their respective Representatives may be involved now or in the future in applications that may compete with Owner, its Affiliates, or any of their respective Representatives or assets. Owner confirms that engaging in such activities by such Persons with knowledge of the Confidential Information of Owner, its Affiliates, or their respective Representatives shall not be, or be deemed to be, a breach of this Agreement; provided that Operator, its Affiliates and their respective Representatives do not disclose such Confidential Information in connection with, or in furtherance of, such activities.
- (e) Notwithstanding any other provision of this Agreement to the contrary, Operator may disclose environmental, health and safety related Confidential Information of Owner, its Affiliates, or their respective Representatives, to directors, officers and employees of Operator and its Affiliates (such as in connection with training programs conducted by Operator or its Affiliate for the employees of Operator and its Affiliates) without such disclosure being, or being deemed to be, a breach of this Agreement; provided that Operator takes reasonable precautions to maintain the confidentiality of any Confidential Information so disclosed.
- (f) Notwithstanding any other provision of this Agreement to the contrary, Operator, its Affiliates and their respective Representatives shall be permitted, without Owner's approval and without violating this Section 16.04, to (a) use performance and financial information related to the Facility as the basis for the preparation of operations and maintenance cost estimates for other projects and (b) disclose in its promotional literature its participation or that of its Affiliate as contract operator of the Facility and a brief description of the Facility and the Services.
- (g) The Parties acknowledge that remedies at law may be inadequate to protect either Party against a breach of this Section 16.04, and the Parties hereby agree in advance to the granting of injunctive relief without the need for proof of actual damages. Subject to the limitations of Section 12.01 {regarding the limitation on consequential damages}, this remedy is cumulative and in addition to such other remedies as may be available under applicable law.

16.05 Notices.

All Notices shall be in writing, except as otherwise stated in this Agreement, and shall be delivered to the Party at the address set forth below. All Notices shall be delivered in a manner which provides written receipt evidencing delivery to such address, such as by facsimile, private courier (e.g., Federal Express), or by registered or certified mail, and delivery to and receipt by the Party shall be deemed to have occurred on the date indicated in the written delivery receipt or facsimile transmission confirmation.

If to Operator: EI Colton, LLC
 C/O NORESKO LLC
 One Research Drive

Suite 400
Westborough, MA 01581
Fax No. (508) 870-9707

Attention: P. Hernandez, VP Finance
cc: E. Liebsch, Director of Operations

If to Owner: City of Colton
150 South 10th Street
Colton, CA 92324
Fax No. (909) 370-5132

Attention: Electric Utilities Director

Notices of changes of address by either Party shall be made in writing within ten (10) days of the effective date of such change.

16.06 Transfers & Assignments.

- (a) General. Except as otherwise provided for in Article XV or this Section 16.06, this Agreement may not be transferred or assigned by either Party without (a) the written consent of the other Party and (b) the written agreement of the transferee or assignee whereby such transferee or assignee expressly assumes and agrees to perform each and every obligation of the transferor or assignor under this Agreement. Any transfer or assignment in violation of this Section 16.06 shall be null and void.

The Parties further agree that the Party whose consent to a transfer or assignment has been requested shall:

- (i) respond in writing not later than thirty (30) days after receiving the other Party's request; and
 - (ii) provide to the other Party, at its own cost and expense, any documentation, including estoppel statements, reasonably requested by such other Party.
- (b) Affiliates. Notwithstanding Paragraph (a), Operator may assign this Agreement to a corporate successor or Affiliate of Operator without Owner's consent, provided that the assignee expressly assumes and agrees to perform each and every obligation of Operator under this Agreement.
- (c) Finance Assignments. Operator shall have the right to collaterally assign this Agreement to any lender (or agent for any such lender) providing financing for Operator's construction, operation or maintenance of the Facility (each such assignee being referred to herein as a "Collateral Assignee"); provided, however, that no such assignment shall be effective for purposes of this Section until Operator shall have notified Owner of such assignment, which notice shall include the name and address of the Collateral Assignee. So long as any assignment of which Owner has been notified, or any consolidation, modification or extension of any such assignment, shall remain outstanding, the following provisions shall apply:

- (i) Owner shall, upon serving upon Operator any notice pursuant to Section 11.01, also serve a copy of such notice upon each Collateral Assignee at the address provided for in the notice referred to above. No notice issued by Owner pursuant to Section 11.01 shall be deemed to have been duly given unless and until a copy thereof shall have been so served.
- (ii) The making of an assignment pursuant to this Section shall not be deemed to constitute an assignment or transfer of this Agreement, nor shall any Collateral Assignee, as such, be deemed to be an assignee or transferee of this Agreement so as to require such Collateral Assignee, as such, to assume the performance of any of the terms or conditions on the part of Operator to be performed hereunder; but the purchaser at any sale of this Agreement in any proceedings for the foreclosure of any assignment, or the assignee or transferee of this Agreement under any instrument of assignment or transfer in lieu of the foreclosure of any assignment, shall be deemed to be, and the Collateral Assignee in exercise of any of its remedies against Operator may elect to be, an assignee or transferee within the meaning of this Section and shall be deemed to have agreed to perform all of Operator's obligations to be performed hereunder.
- (iii) Any election by any Collateral Assignee to assume this Agreement, any sale of this Agreement in any proceeding for the foreclosure of any assignment, or the assignment or transfer of this Agreement in lieu of the foreclosure of any assignment shall be deemed to be a permitted sale, transfer or assignment of this Agreement, and this Agreement shall continue in full force and effect following any such assumption, sale, transfer or assignment.
- (iv) No agreement between the Parties modifying, amending, canceling or surrendering this Agreement shall be effective without the prior written consent of all Collateral Assignees.

16.07 Late Payments.

Any amounts due and payable in accordance with this Agreement by one Party to the other Party and not paid in full on or before the date such payment is due shall accrue interest at the Overdue Payment Rate from and excluding the date such payment is due to and including the day such unpaid and overdue amount plus accrued interest is paid.

16.08 Third Party Beneficiaries.

Except as expressly provided herein, this Agreement is intended to be solely for the benefit of Owner, Operator and their respective successors and permitted assigns, and is not intended to and shall not confer any rights or benefits on any Person not a signatory hereto.

16.09 Title Passage.

Title to all materials, equipment, supplies, consumables, spare parts and other items purchased or obtained by Operator and paid for ultimately by Owner in accordance with this Agreement shall pass immediately to and vest in Owner upon the passage of title from the vendor or supplier thereof; provided that such transfer of title shall in no way affect Operator's obligations as set forth in the other provisions of this Agreement.

All documents prepared or developed by Operator, its Affiliates or their respective

Representatives in connection with the Facility or the performance of the Services, including all manuals, data, designs, drawings, plans, specifications, records, reports and accounts, shall become the property of Owner when prepared or developed. All such documents, together with any materials and documents furnished by Owner to Operator, its Affiliates or to their respective Representatives in connection with the Facility or the performance of the Services, shall be delivered to Owner upon the expiration or termination of this Agreement.

16.10 Relationship of Parties.

Operator is retained by Owner as an independent contractor to operate and maintain the Facility on behalf of Owner and no employees of Operator or its Affiliates shall be deemed to be employees of Owner or its Affiliates. Owner delegates to Operator the overall responsibility for operating and maintaining the Facility in accordance with this Agreement. Nothing contained in this Agreement shall be construed to create an association, trust, partnership or joint venture between the Parties.

16.11 Entire Agreement.

This Agreement consists of the terms and conditions set forth herein, as well as the Appendices hereto, which are incorporated by reference herein and made a part hereof. This Agreement contains the entire agreement between the Parties with respect to operation and maintenance of the Facility and supersedes all prior negotiations, undertakings, agreements and business term sheets.

16.12 Amendments.

No amendments or modifications of this Agreement shall be valid unless evidenced in writing and signed by duly authorized representatives of both Parties.

16.13 Governing Law and Venue.

This Agreement, including its construction, interpretation and effect, shall be governed by the laws of the State of California without regard to the conflicts of laws. Any action to interpret or enforce this Agreement shall be brought and maintained exclusively in the courts of and for San Bernardino County, California.

16.14 Severability.

The invalidity, in whole or in part, of any of the Sections or paragraphs of this Agreement will not affect the validity of the remainder of such Sections or paragraphs.

16.15 Waiver.

Failure by either Party to exercise any of its rights under this Agreement shall not constitute a waiver of such rights. Neither Party shall be deemed to have waived any of its rights under this Agreement unless it has made such waiver specifically in writing.

16.16 Counterparts.

This Agreement may be executed in one or more counterparts each of which shall be deemed an original and all of which shall be deemed one and the same Agreement.

16.17 Captions.

The Table of Contents and the titles or captions of Articles, Sections and Appendices and the

brief descriptions within the "{ }" appearing after each Article, Section and Appendix citation, contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend, describe or otherwise affect the scope or meaning of this Agreement or the intent of any provision hereof.

16.18 Construction.

This Agreement is the result of negotiations between, and has been reviewed by, the Parties and their respective counsel. Accordingly, this Agreement shall be deemed to be the product of each Party, and there shall be no presumption that an ambiguity should be construed in favor of or against Owner or Operator solely as a result of such Party's actual or alleged role in the drafting of this Agreement.

16.19 Authority.

Operator and Owner hereby represent and warrant that their respective representatives signing this Agreement has full power and property authority to sign this Agreement and to bind the respective parties.

IN WITNESS WHEREOF the Parties have executed and delivered this Agreement as of the Effective Date.

Owner:

Operator:

THE CITY OF COLTON, CALIFORNIA

EI COLTON, LLC

By: _____

Sarah S. Zamora
Mayor

By: _____

David G. Mannherz
Executive Vice President

APPROVED AS TO FORM:

City Attorney

APPENDIX A - SITE DESCRIPTION

Fidelity National Title Insurance Company

FILE NO. 02-3706-5444CA

COMMITMENT NO.: 33046345 (Revision No. 4)

PREPARED FOR: Steven H. Clevett
 Noresco, LLC
 Energy Infrastructure
 1 Research Drive
 Westborough, MA 01581

PREMISES: 2040 Agua Mansa Road, San Bernardino, California

COUNTY: San Bernardino

LOCALITY:

DISTRICT(S):

SECTION(S):

BLOCK(S):

LOT(S):

SCHEDULE A

1. EFFECTIVE 9:00AM August 6, 2002 REDATED 9:00 AM CLOSER'S SIGNATURE: _____

2. POLICY OR POLICIES TO BE ISSUED:

a. ☒ ALTA Owner 1992

Amount of Insurance \$4,946,760.00

Proposed Insured: EI Colton LLC, a Delaware limited liability company

b. ☐ ALTA Loan 1992

Amount of Insurance

Proposed Insured:

c. ☐ ALTA Loan 1992

Amount of Insurance

Proposed Insured:

3. THE ESTATE OR INTEREST IN THE LAND DESCRIBED OR REFERRED TO IN THIS COMMITMENT AND COVERED HEREIN IS:

FEE SIMPLE

4. TITLE TO THE ESTATE OR INTEREST IN SAID LAND DESCRIBED OR REFERRED TO IN THIS COMMITMENT IS AT THE EFFECTIVE DATE HEREOF VESTED IN:

James Beckett and Frances Beckett, husband and wife as joint tenants

Source of Title:

By Grant Deed recorded July 15, 1987 as Instrument No. 87-240840.

5. THE LAND REFERRED TO IN THIS COMMITMENT IS DESCRIBED AS FOLLOWS:

See Schedule A, Section I (Description), following.

Fidelity National Title Insurance Company

FILE NO. 02-3706-5444CA

COMMITMENT NO. 33046345 (Revision No. 4)

SCHEDULE A - SECTION I (Description)

The land referred to in the Commitment is in the State of California, County of San Bernardino and is described as follows:

Being a portion of Lot 39 of the Bandini Donation in the City of Colton, County of San Bernardino, State of California, as per Map recorded in Book 3, Page(s) 24, of Maps; Also being a portion of that portion deeded to James Beckett and Francis Beckett per Instrument No. 240840 Official Records, recorded July 15, 1987, in the Office of the County Recorder of San Bernardino County, said County, State of California, more particularly described as follows:

Commencing at a 3/4" iron pipe per record of Survey Book 8, Page(s) 4, (R.S. 8/4), Office of said County Recorder at the Intersection of the westerly line of said Bandini Donation with the southeasterly line of Agua Mansa Road;

Thence North 48 degrees 27 minutes 24 seconds East a distance of 392.22 feet to a 1" iron pipe with yellow plastic plug marked "L.S. 5424", being the most northwesterly corner of said Beckett Property; also being the point of beginning;

Thence continuing North 48 degrees 27 minutes 24 seconds East a distance of 156.49 feet; to a 1/2" iron pipe per said R.S. 8/4;

Thence North 42 degrees 39 minutes 24 seconds East a distance of 212.56 feet; to a 1" iron pipe with yellow plastic plug marked "L.S. 5424";

Thence North 28 degrees 26 minutes 18 seconds East a distance of 128.14 feet; to a 1" iron pipe with yellow plastic plug marked "L.S. 5424";

Thence North 20 degrees 59 minutes 15 seconds East a distance of 465.60 feet; to a 1" iron pipe with yellow plastic plug marked "L.S. 5424";

Thence North 33 degrees 22 minutes 20 seconds East a distance of 155.67 feet; to a 1" iron pipe with yellow plastic plug marked "L.S. 5424";

Thence North 49 degrees 04 minutes 27 seconds East a distance of 362.70 feet to a 1" iron pipe tagged "R.C.E 30238" per Record of Survey, Book 90, Page 4, (R.S. 90/4) at the most northerly corner of said Beckett Property

Thence South 58 degrees 30 minutes 36 seconds East a distance of 755.06 feet; to a 1" iron pipe tagged "R.C.E 30238" per said R.S. 90/4;

THE POLICY TO BE ISSUED under this Commitment will insure the title to such buildings and improvements on premises which by law constitute real property.

FOR CONVEYANCING ONLY: Together with all the right, title and interest of the party of the first part, of, in and to

Fidelity National Title Insurance Company

FILE NO: 02-3706-5444CA

COMMITMENT NO.: 33046345 (Revision No. 4)

SCHEDULE A - SECTION I (Description)
— Continued —

Thence South 52 degrees 28 minutes 05 seconds East a distance of 901.52 feet; to a 1" iron pipe tagged "R.C.E. 9101" per said R.S. 90/4 on the northwesterly line of property deeded to A. Pellissier per Book 719, Page(s) 243, of Deeds;

Thence South 34 degrees 37 minutes 00 seconds West coincident with said northwesterly line a distance of 1219.26 feet to a 1" iron pipe tagged "R.C.E. 9101" per said R.S. 90/4;

Thence South 22 degrees 41 minutes 24 seconds West a distance of 276.65 feet; to a 1" iron pipe with yellow plastic plug marked "L.S. 5424", at the intersection with the northeasterly line of that Property deeded to C.R. Hudson, et ux. per O.R. 6137/9;

Thence North 53 degrees 53 minutes 19 seconds West coincident with said northwesterly line a distance of 1742.89 feet to the point of beginning;

Excepting therefrom the following described property;

Beginning at the most northerly corner of said Beckett Property;

Thence South 58 degrees 30 minutes 36 seconds east a distance of 755.06 feet, to a 1" iron pipe tagged "R.C.E. 30238" per said R.S. 90/4;

Thence South 52 degrees 28 minutes 05 seconds East a distance of 901.52 feet; to a 1" iron pipe tagged "R.C.E. 9101" per said R.S. 90/4, on the northwesterly line of property deeded to A. Pellissier per Book 719, Page(s) 243 of Deeds;

Thence South 34 degrees 37 minutes 00 seconds West coincident with said northwesterly line a distance of 1219.26 feet, to a 1" iron pipe tagged "R.C.E. 9101" per said R.S. 90/4;

Thence South 22 degrees 41 minutes 24 seconds West a distance of 276.55 feet; to a 1" iron pipe with yellow plastic plug marked "L.S. 5424", at the intersection with the northeasterly line of that property deeded to C.R. Hudson, et ux. per O.R. 6137/9;

Thence North 53 degrees 53 minutes 19 seconds West coincident with said northeasterly line a distance of 572.47 feet to a 1" iron pipe with yellow plastic plug marked "L.S. 5424";

THE POLICY TO BE ISSUED under this Commitment will insure the title to such buildings and improvements on the premises which by law constitute real property.

FOR CONVEYANCING ONLY: Together with all the right, title and interest of the party of the first part, of, in and to the

Fidelity National Title Insurance Company

FILE NO. 02-3786-5444CA

COMMITMENT NO. 33046345 (Revision No. 4)

September 18, 2002 02-3786-5444-NFD

SCHEDULE A - SECTION I (Description)
— Continued —

Thence North 34 degrees 40 minutes 15 seconds East a distance of 1426.07 feet; to a 1" iron pipe with yellow plastic plug marked "L.S. 5424";

Thence North 52 degrees 28 minutes 05 seconds West a distance of 386.97 feet; to a 1" iron pipe with yellow plastic plug marked "L.S. 5424";

Thence North 58 degrees 30 minutes 36 seconds West a distance of 774.87 feet to a 1" iron pipe tagged "R.C.E. 30238" per said R.S. 90/4, at a northwesterly boundary of said Beckett Property;

Thence North 49 degrees 04 minutes 27 seconds East coincident with said northwesterly boundary a distance of 78.67 feet to the Point of Beginning.

Pursuant to Certificate of Compliance No. 93-001 recorded May 24, 1993 as Instrument No. 93-221024, Official Records.

THE POLICY TO BE ISSUED under this Commitment will insure the title to such buildings and improvements on premises which by law constitute real property.

FOR CONVEYANCING ONLY: Together with all the right, title and interest of the party of the first part, of, in and to

APPENDIX B - EHS MATTERS

Operator is committed to compliance with all Applicable Laws, and operation and maintenance of the Facility in a safe and environmentally responsible manner. The policies, procedures and practices of Operator regarding the performance of its obligations under this Agreement, shall reflect this commitment. The following sets forth certain obligations of the Parties and certain procedures which are a manifestation of this commitment as it relates to EHS matters.

1. Policies, Plans and Procedures.

Operator shall prepare or cause to be prepared a written EHS policy that reflects its commitment to fully and completely comply with all EHS-related Applicable Laws and to fulfill its obligations under this Agreement in a safe and environmentally responsible manner. Operator shall adopt its EHS policy in writing. This policy shall indicate the assignment of management responsibility and accountability for (a) the enforcement of the policy, (b) the development and implementation of related plans and procedures and (c) periodic assessment of (i) the effectiveness of the EHS-related policies, plans and procedures and (ii) the compliance with EHS-related Applicable Laws. Operator shall also regularly and fully communicate its EHS-related policies, plans and procedures to each of its employees and the employees of its Affiliates engaged in Facility related activities.

2. Planning and Budgeting.

Each Operating Plan & Budget shall include (a) a detailed allocation between Owner and Operator of the responsibility for complying with each EHS-related Applicable Law and (b) the obligations of Operator under this Agreement with respect to the other EHS-related objectives established by the Parties. Each Operating Plan & Budget shall reflect the resources, including human, physical and financial, required by Operator with respect to its obligations under this Agreement including complying with all EHS-related Applicable Laws and this Appendix B and achieving the other EHS-related objectives established by the Parties.

3. Implementation and Management.

3.01 Operator shall utilize appropriately qualified Persons for the activities described in this Appendix B.

3.02 Operator's commitments to comply with all EHS-related Applicable Laws and fulfill its obligations under this Agreement with respect to all other EHS-related objectives established by the Parties shall be reflected in the job descriptions and individual performance objectives for members of the Facility Work Force.

3.03 Prior to the Commencement Date, a qualified independent Person, selected by Operator and reasonably acceptable to Owner, shall be retained to prepare a written document that identifies all health and safety related Applicable Laws and sets forth how each such Applicable Law applies to the Facility, the Services, Owner or Operator. This document shall be subject to review and comment by Owner and to review and written approval by Operator. This document shall be made readily available in a convenient location to Owner, Operator and the Facility Work Force personnel.

3.04 As part of the Services, Operator shall prepare policies, plans and procedures which address specifically Operator's obligations under this Agreement with respect to

- (a) compliance with all EHS-related Applicable Laws;
- (b) the other EHS-related objectives established by the Parties; and
- (c) the specific assignment of responsibility and accountability for complying with EHS-related Applicable Laws and achieving the other EHS-related objectives established by the Parties.

These policies, plans and procedures shall provide for

- (d) open and regular opportunities for the communication and discussion of EHS-related issues;
- (e) the development and maintenance of effective working relationships with certain Governmental Authorities and the documentation of any verbal understandings or agreements regarding the interpretation of or alternatives to any EHS-related Applicable Law or conditions within any Governmental Approval;
- (f) the development and maintenance of effective working relationships with representatives of the community in which the Facility is located and the documentation in writing, with a copy to Owner, of all communications with such representatives;
- (g) record keeping and reporting as required by EHS-related Applicable Laws and as otherwise specified by Owner;
- (h) the effective management of inspections by Governmental Authorities, including Owner's approval of such inspections and the analysis and communication to appropriate Persons of the results of such inspections;
- (i) the development and maintenance of a system for tracking deadlines for meeting requirements of EHS-related Applicable Laws (including the submission of reports and the renewal or extension of Governmental Approvals) and the issuance of advance written notification, with a copy to Owner, of such requirement deadlines to the Person responsible for fulfilling such requirements; and
- (j) with respect to a sudden unexpected situation, such as the discharge of a Hazardous Material or the failure of pollution control equipment, which results, or could result, in a violation of Applicable Laws, (i) the timely response to such situation, (ii) the mitigation of the adverse effects of such situation, (iii) the documentation of the situation and Operator's response to such situation and (iv) the notification of (A) certain Governmental Authorities in accordance with Applicable Laws and (B) as appropriate, certain representatives of the local community, including fire, police and health authorities.

The policies, plans and procedures prepared by Operator in accordance with this paragraph 3.04 shall be subject to review and written approval by Owner. Operator shall periodically update these policies, plans and procedures on a timely basis as required to reflect

(a) changes in (i) the Facility, (ii) each Party's respective obligations under this Agreement and (iii) EHS-related Applicable Laws and (b) EHS-related objectives achieved or established by the Parties.

3.05 During the Term, a qualified independent Person, selected by Operator and reasonably acceptable to Owner, shall be retained to (a) review periodically (no less often than once every year) and amend, as appropriate, the document prepared in accordance with paragraph 3.04 of this Appendix B and (b) identify emerging health and safety related issues that may impact the Facility, the Services, Owner or Operator. These documents shall be subject to review and comment by Owner and to review and written approval by Operator. These documents shall be made readily available in a convenient location to Owner, Operator and the Facility Work Force personnel. Each Operating Plan & Budget shall include reasonable amounts for the completion of these activities.

3.06 During the Term, the Parties shall meet periodically (no less often than once every year) to (a) establish EHS-related objectives, (b) develop and document plans, including schedules, for achieving such objectives and (c) identify resources needed to achieve such objectives.

3.07 Operator shall deliver a written Notice to Owner of any modification to the Facility, the Services or the Operating Plan & Budget required to comply with any EHS-related Applicable Law. Each such Notice shall include a description of the required modification, the reason such modification is required and the estimated cost of and proposed schedule for implementing the required modification.

3.08 Operator shall conduct or cause to be conducted, for the Parties and their personnel, routine (no less often than once every year) training in (a) the identification and interpretation of EHS-related Applicable Laws and (b) the policies, plans and procedures for (i) complying with all EHS-related Applicable Laws and (ii) achieving the other EHS-related objectives established by the Parties.

4. Assessment and Improvement.

The policies, plans and procedures developed and maintained by Operator in accordance with paragraph 3.03 of this Appendix B shall provide for

- (a) monitoring, in accordance with EHS-related Applicable Laws, and assessing the performance of the Facility and compliance with EHS-related Applicable Laws, and, as indicated, planning and implementing, subject to the written approval of Owner, improvement activities and corrective measures (including changes to systems or processes) on a timely basis;
- (b) monitoring and assessing (i) the effectiveness of EHS-related policies, plans and procedures and (ii) the compliance therewith, and, as indicated, planning and implementing, subject to the written approval of Owner, improvement activities and corrective measures (including changes to systems or processes) on a timely basis;
- (c) monitoring and assessing progress toward achieving EHS-related objectives established by the Parties, and, as indicated, planning and implementing, subject to the written

approval of Owner, improvement activities and corrective measures (including changes to systems or processes) on a timely basis; and

- (d) documenting the results of the monitoring and assessing done, the improvement activities undertaken and the corrective measures implemented in accordance with items (a), (b) and (c) of this paragraph 4, and reporting the same to (a) certain Governmental Authorities, in accordance with Applicable Laws, (b) Owner in a form and substance and with a frequency reasonably requested by Owner and (c) Operator and, as appropriate, the members of the Facility Work Force.

APPENDIX C –OVERHEAD PRODUCTS AND SERVICES

Non-Reimbursable

The following are examples of products and services which shall be provided by Operator at no additional cost to Owner (i.e. the Base Fee compensates Operator for providing these products and services)

Detailed guidelines or outlines for administration policy and procedure manuals, employee handbooks, O&M procedure manuals, environmental, health and safety policy manuals and training program manuals and materials.

Supervision and general operations and maintenance technical support provided by the off-site personnel of Operator or its Affiliates

General environmental compliance, health and safety related technical support provided by the off-site personnel of Operator or its Affiliates

Human resources management, pre-retirement benefits program and payroll administration and defined contribution pension plan administration services performed by Operator or its Affiliates

Detailed guidelines or outlines for general, management, environmental compliance, health, safety and technical training programs

Travel and living expenses incurred by the off-site personnel of Operator and its Affiliates in the delivery of any of the above products and services

NORESCO staff vehicles, office supplies, office cleaning supplies and services. NORESO IT equipment, software and ancillaries used for NORESO management and administrative purposes.

Reimbursable

In addition to Operating Expenses, the following are examples of products and services which may result in a cost for which Operator is entitled to be reimbursed subject to the approval of Owner

Amending and supplementing these documents for use at the Facility as well as integrating any O&M information provided by Owner, the Facility design engineer, the construction contractor, the equipment suppliers and the insurance underwriters.

Information technology, including computer hardware and other equipment and software dedicated exclusively to the Facility, wherever located, and data links with the corporate offices of Operator and its Affiliates, Owner, and Owner's dispatch coordinator

Facility specific services provided by off-site personnel of Operator or its Affiliates, which are not readily applicable within a reasonable period of time to other projects operated by Operator or its Affiliates

Facility specific tasks, such as audits, permit modifications or developing environmental compliance, health and safety programs which are performed by the off-site personnel of Operator or its Affiliates and not readily applicable within a reasonable period of time to other projects operated by Operator or its Affiliates

Recruiting the Facility Work Force personnel, including search, advertising and reasonable relocation expenses; and benefits administration services performed by other than Operator or its Affiliates

Reasonable travel and living expenses incurred by the personnel of Operator and its Affiliates (i) in the delivery of any of the above products and services; and (ii) for attendance at off-site meetings, such as plant managers meetings and environmental compliance, health and safety meetings, sponsored by Operator or its Affiliates

ATTACHMENT 2

Request and Release Form from Noresco, dba E.I. Colton,
LLC

NORESCO

November 9, 2011

To City Manager, City of Colton:

NORESCO Holdings, Inc. is competing for a project with the City of Los Angeles Bureau of Sanitation. This is a large development project at the City of Los Angeles' Hyperion Treatment Plant. To demonstrate our experience developing and implementing large projects, we would like to showcase the City of Colton Agua Mansa Power Plant. We solicit your permission to use photographs and videos of the plant to demonstrate our design, development, construction, start-up and commissioning, and operations & maintenance capabilities. NORESKO would also like to use these photos and videos for future marketing efforts such as promotional brochures, case studies etc.

We are requesting that an authorized representative of the City of Colton sign the attached release form. This gives us permission to take photographs and produce a video of the Agua Mansa Power Plant that may include testimonials from individuals that represent the City of Colton.

Your assistance in this matter is greatly appreciated. If you have any questions, please contact me at 909-825-1679.

Sincerely,



Wayne Feragen
Sr. Plant Manager
NORESCO
wferagen@noresco.com

NORESCO
One Research Drive
Westborough, MA 01581

NORESCO

RELEASE FORM:

Municipality: The City of Colton (the "CITY")

Contact: Rod Foster

Title: City Manager

Ph: (909) 370-5051

e-mail: RFoster@ci.colton.ca.us

Address:

650 N. La Cadena

Colton, CA 92324

Project Name: Los Angeles Waster Water Treatment Plant

I, (the undersigned) represent that I am a duly authorized representative of the CITY. In accordance with the terms of this release, CITY hereby grants to NORESO authorization to use the CITY name in its client list, and the nature of CITY's relationship with NORESO in connection with the above-identified project for use in NORESO's marketing campaign, including client list, press releases, case studies, photos, promotional brochures and other publications (e.g., annual reports) which may be created, by or on behalf of NORESO and reference CITY and the project. This authorization shall extend to NORESO's parent, Carrier Corporation. Neither NORESO nor Carrier, its subsidiaries, successors and assigns has authorization to use the CITY name for any other purpose.

Name: Rod Foster

Date: _____

Signed: _____

Initials: _____